

### UNAUTHORIZED PRACTICE OF LAW AND THE POWER OF STATE COURTS: DIFFICULT PROBLEMS AND THEIR RESOLUTION

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The effectiveness of the legal order in every state is heavily dependent on the state's unauthorized practice laws. These laws impose restrictions on who may practice law and, in important respects, impose controls on the availability of legal services to those in need of such services and on the quality of the services offered. This is predominantly a field of state law. Federal unauthorized practice laws exist but affect only limited segments of the overall legal services market.<sup>1</sup> Unauthorized practice laws are highly contro-

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1. Federal unauthorized practice laws include restrictions on who may appear before the federal courts and federal administrative agencies. See *infra* note 37 and accompanying text; Thomas J. Andersen, *The Federal Practice Exception: Limitations on State Regulation of Federal Practitioners*, 23 W. ST. U. L. REV. 281 (1996). Also, the Federal Constitution imposes some restrictions on state unauthorized practice laws as it does on most other kinds of state laws. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 827-28 (1986); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 44-96 (1981). On federal unau-

versial, and many powerful interest groups consider these laws unjustified monopoly protection of lawyers. Pressures exist to ease substantially existing restrictions on unauthorized law practice, and these pressures can be expected to increase in the future. However, powerful forces within the bar are opposed to easing the restrictions and favor stricter enforcement of existing legal restraints on unauthorized law practice.

The breadth and specificity of legal controls over unauthorized practice of law can vary greatly, depending on which branch of a state's government has ultimate power over what these controls shall be. State courts are quite likely to impose different restrictions from those that the legislative or executive branches would prefer. Power allocation among the branches of state government is essentially a state constitution separation-of-powers issue. As the texts of state constitutions on separation of powers and power allocation to the different branches of state government are typically very vague, interpretations of the constitutions' texts are required to determine how power has been allocated. In a majority of states the state constitution is interpreted as giving the state's courts ultimate power, and in a few states exclusive power, to determine what is and is not the unauthorized practice of law. In all states, state courts have a significant role in enforcing and clarifying unauthorized practice laws; but in a majority of states, the courts' constitutionally allocated ultimate power over these laws substantially enhances this role. It is quite apparent that in all states the state's courts will be important to the success of most any future efforts to revise or more aggressively enforce unauthorized practice laws; and in a majority of states, the state's courts will likely be the crucial and final determinants of the success of these efforts.

Although this Article focuses most particularly on the power of state courts over the unauthorized practice of law, Part I considers some important aspects of the legal services market and reviews the legal restrictions that unauthorized practice laws have imposed on that market. This background information is essential to an adequate understanding of the current importance of the judicial power issue to the unauthorized practice of law, to the legal services market and to the legal profession and other providers of legal services. Part II reviews the scope of state court constitutional power over un-

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thorized practice of law and federal unauthorized practice restrictions, also see William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1536-58 (2001).

authorized law practice and the variations among the states on the extent of that power. Part III considers the process generally followed in interpreting state constitutions. It also considers some of the justifications advanced by courts and others in their interpretive conclusions as to the scope of state court power, including power over unauthorized law practice. In Part IV, some predictions are made as to where unauthorized practice laws and state court power over those laws seem headed. In conclusion, Part V stresses that past state court performance on unauthorized practice matters leaves much to be desired and considers some proposals for improving the processes the courts follow in making decisions on these matters.

The extent and effectiveness of restrictions on the unauthorized practice of law and how state courts should be involved in shaping and enforcing them are issues of tremendous importance to the future of the justice system in this country. The political and judicial leadership in every state should be more aware of the importance of these issues and more concerned about how best to solve the problems they raise. There are many options available for solving unauthorized practice and judicial power problems, as subsequent pages of this Article make clear. It is the responsibility of the political and judicial leadership in each state to select the best options for that state as to how these problems should be solved. In many states, past performance of this leadership in solving these problems has been disappointing. It is important that there be improvement in the future, especially since, as seems likely, pressure to enforce and reform unauthorized practice laws will escalate.

## I. THE MULTIFACETED UNAUTHORIZED PRACTICE OF LAW PROBLEM

Unauthorized practice of law as a field of legal regulation has several important characteristics meriting special emphasis: the extensive variation from state to state in what constitutes the unauthorized practice of law; the frequent ambiguity as to who and what are being regulated; the variety of professions and occupations subject to unauthorized practice restrictions; and the widespread lack of the law's enforcement.

The unauthorized practice of law regulates the delivery of legal services. But what are legal services? The term "legal services" as used here is in accord with what is usually meant by the term. Legal services consist principally of one or more of the following: preparation of legal instruments, providing answers to legal prob-

lems (legal advice), and appearance in a representational capacity before adjudicatory tribunals. Some additional types of service, such as negotiating binding legal agreements and urging particular solutions to pending legal issues when lobbying government legislative or executive officials, also are often included as forms of legal service.<sup>2</sup>

#### *A. The Competitive Market for Legal Services*

Although lawyers concentrate on providing legal services and in this country are the principal providers of such services, they are not now, nor have they been at any time in the past, the sole providers of such services. A wide range of businesses and occupations have long provided legal services to themselves and others, frequently in competition with lawyers. Among the more influential and competitively significant of these lawyer competitors are accountants, both CPAs and public accountants; business consultants; architects; real estate brokers; title insurance companies; commercial banks; and savings and loan companies. There are many others.<sup>3</sup> In a sense, paralegals, too, are lawyer competitors. These nonlawyers, employed to perform legal services in many law offices, have become sufficiently numerous and important that they no doubt are reducing the need for junior lawyers in many law offices.<sup>4</sup> The competitive market of lawyers and nonlawyers includes many fields of law, among them government taxation of all kinds, real estate conveyancing and financing, corporate mergers and acquisitions, trusts and estates, debt collection, and immigration. Lawyers even have

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2. Types of legal services are described in some definitions of the practice of law. For examples of such definitions, see *infra* note 30.

3. Some of the other businesses and occupations that provide legal services that compete with lawyers are life insurance companies; tax return preparation and advice services, such as H&R Block; collection agencies; insurance adjusters; immigration consultants; lay practitioners who represent parties in some kinds of administrative agency proceedings; escrow agents; and document preparation services. In addition, there is a miscellany of nonlawyers who provide advice and drafting assistance to mostly lower-income persons in some communities.

4. A study of paralegals in the mid-1980s estimated that at that time, in U.S. law offices of all kinds, there was on average one paralegal for every eight lawyers working in those offices. QUINTIN JOHNSTONE & MARTIN WENGLINSKY, *PARALEGALS, PROGRESS AND PROSPECTS OF A SATELLITE OCCUPATION* 4 (1985). If this ratio is still in effect, and something close to it probably still is, there are about 100,000 paralegals providing legal services in law offices today. On the role of traditional paralegals, see *id.*, and ABA Comm'n on Nonlawyer Practice, *Nonlawyer Practice in the United States: Summary of the Factual Record Before the Commission* 13-15 (1994).

some competition from nonlawyers in providing litigation services, most notably in litigation preparation and in representation of parties before some administrative agencies.

One difference between lawyers and nonlawyers as legal services providers is that, collectively, lawyers as a profession provide all kinds of legal services and in all fields of law, whereas each of the nonlawyer professions and occupations, except paralegals, most always operate in more limited legal service spheres. For example, real estate brokers limit their legal services almost exclusively to those required in conveyancing and financing of real estate, and collection agencies limit their legal services to those required in collecting delinquent debts. Others, such as accountants, provide a somewhat greater range of legal services, although traditionally focusing heavily on legal problems related to auditing and income taxation.

The legal services market involves not only competition between lawyers and nonlawyers but also competition among lawyers. Lawyers compete with one another for clients and this competition has become more intense in recent years. Several aspects of this intraprofessional competition are of particular relevance to issues of unauthorized practice of law: multijurisdictional practice by lawyers (also known as interjurisdictional practice); legal services provided by house counsel whose practice base is in a state where they are not admitted to practice; and multidisciplinary practice, including full-time lawyer employees of business and professional firms, owned and controlled by nonlawyers, that provide legal services to clients of their nonlawyer employer.

Many lawyers in the course of their practice engage in multijurisdictional practice representing clients in matters that require legal services to be provided in two or more states: the state where the lawyer's practice is principally based and one or more other states. The legal work needed in the other state or states can include such services as factual investigation, taking depositions, settlement negotiation, arbitration or appearance before a court or administrative agency.<sup>5</sup> Lawyers who themselves go to another state to provide these services often are competing with the other state's lawyers,

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5. On multijurisdictional practice by lawyers and its unauthorized practice implications, see WOLFRAM, *supra* note 1, at 865-74; Symposium, *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995); Barker, *supra* note 1; Quintin Johnstone, *Multijurisdictional Practice of Law: Its Prevalence and Its Risks*, 74 CONN. B. J. 343 (2000) (reviewing a Connecticut Bar Foundation symposium on multijurisdictional practice).

those likely to be retained to do the work if the initially retained lawyers had not done so.<sup>6</sup> Intraprofessional competition can be a significant consequence of multijurisdictional law practice. Multijurisdictional practice is not, of course, restricted to interstate practice. It also may involve practices concerning the law of different nations in which lawyers licensed in the United States do some of their work abroad or foreign lawyers provide legal services in this country. This international form of multijurisdictional practice is less extensive than interstate practice but can also result in unauthorized practice violations.

A subgroup of lawyers that have caused special unauthorized practice concerns are house counsel admitted to practice law, but not in the state where they are based, and who provide legal services to their employer but not to clients or customers of their employer.<sup>7</sup> Most of these house counsel are employed by large corporations that do business nationally, many of them even internationally. The problem, of course, is that the lawyers are admitted to practice in one jurisdiction but most of their legal work is in their home office jurisdiction, a jurisdiction where they are not legally authorized to practice. A common reason for these house counsel not being admitted to practice where their principal office is located is that their employer has widely scattered offices and rather frequently moves its house lawyers from an office base in one state to another base of operations in another state. These moves may be temporary, which deters the lawyers from seeking admission to practice in the state where they presently are based when, as is typical, admission may be a slow, protracted process. There are no reliable records on how many house counsel there are who are not admitted in the state

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6. A more extensive form of multijurisdictional law practice is the lawyer based in one state representing clients in another state when all the legal services are provided in the other state. This type of multijurisdictional practice is particularly likely with lawyers based near the border of another state and who seek and acquire clients in the adjoining state.

7. See Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075 (1995); Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1356-58 (2000) [hereinafter Needham, *Permitting Lawyers*] (including a list of states that as of 2000 permitted out-of-state in-house counsel to provide legal services for their employer; Oregon has recently joined this list, see *infra* note 45).

A complicating aspect of the work of some of these house counsel is that on occasion they also may provide some legal services to employees of the corporation. Local lawyers admitted in the state often are particularly resentful of this competition.

where their present principal office is located but nationwide there quite possibly are over a thousand of them. Even some general counsel of major corporations are among these house counsel not admitted in the state where they do most of their work.

Another kind of legal service delivery that is enhancing competition among lawyers is multidisciplinary practice. This is a type of practice in which the provider of legal services provides both legal and nonlegal services to clients.<sup>8</sup> Many multidisciplinary practice operations are by firms, such as the big accounting firms, that employ lawyers but are owned or controlled by nonlawyers. Most forms of multidisciplinary practice also enhance competition between law firms and some well-established and economically and politically powerful professional and business firms owned and controlled by nonlawyers. Multidisciplinary practice has recently become highly controversial, and proposals with considerable support have been advanced to more effectively restrict and regulate it. However, there also is strong support for permitting multidisciplinary practice to take over even more of the legal services market in the United States.<sup>9</sup> A scattering of support for multidisciplinary

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8. The ABA Commission on Multidisciplinary Practice defined a multidisciplinary practice firm as follows: "a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the multidisciplinary practice itself or that holds itself out to the public as providing nonlegal, as well as legal, services." ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates* 5 (Aug. 1999) [hereinafter ABA Comm'n, *August 1999 Report*].

9. A vast literature on multidisciplinary practice has recently developed. For the various forms of multidisciplinary practice and diverse views on the merits of this type of practice, see, e.g., ABA Comm'n on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (Jan. 1999); ABA Comm'n, *August 1999 Report*; ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates* (May 2000) [hereinafter ABA Comm'n, *May 2000 Report*]; ABA Law Practice and Mgmt. Section, Symposium, *Multidisciplinary Practice, Staying Competitive and Adapting to Change* (2001); N.Y. Law School's Ctr. for Int'l Law, Symposium, *Multidisciplinary Practice* (Oct. 1999); N.Y. State Bar Ass'n, Special Comm. on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession, The Place of Multidisciplinary Practice in the Law Governing Lawyers* (April 2000) [hereinafter N.Y. State Bar Ass'n, *April 2000 Report*]; Symposium, *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000); Philip S. Anderson, *Facing Up to Multidisciplinary Practice*, 50 J. LEGAL EDUC. 473 (2000); Sydney M. Cone III, *Views on Multidisciplinary Practice With Particular Reference to Law and Economics*, New York, and North Carolina, 36 WAKE FOREST L. REV. 1 (2001); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 219 (2000) (Professor Daly was the Reporter for the ABA Commission on Multidisciplinary Practice, and her article is a helpful review

practice has come from solo and small-firm lawyers. Some of these lawyers who serve ordinary people and small businesses are attracted to the possibilities multidisciplinary practice offers of entering into partnership with nonlawyer service groups such as family counselors, small accounting firms and local real estate brokers.<sup>10</sup> Multidisciplinary practice is also becoming much more common in other parts of the world, especially Europe, and is a concern to those U.S. law firms that are operating abroad.<sup>11</sup> Some see multidisciplinary practice as a product of globalization and a result of market forces that cannot be stopped.<sup>12</sup> Proponents of multidisciplinary practice stress that this type of practice can increase efficiency and reduce the cost of legal service delivery, with resulting lower fees to consumers of these services both from multidisciplinary practices and from lawyers forced to compete with multidisciplinary practices.<sup>13</sup> Multidisciplinary practice opponents assert that this kind of practice, especially fully integrated multidisciplinary practice, seriously threatens the quality and reliability of legal services by weakening adherence to the standards of professional conduct binding on lawyers. Professional standards, it is claimed, that are particularly vulnerable to violation when this kind of practice is engaged in are the independence of participating lawyers in advising and represent-

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and analysis of the Commission's actions); Jenny B. Davis, *The Enron Factor*, 88 A.B.A. J. 40 (April 2002); John S. Dzienkowski & Robert Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Lawrence J. Fox, *Old Wine in Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971 (1999).

10. See James W. Jones, *Focusing the Multidisciplinary Practice Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989, 994-95 (1999).

11. On multidisciplinary practice in other countries, see N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at ch. 9; Daly, *supra* note 9, at 227-40 (considering the delivery of legal services by the major accounting firms outside the United States); Ramón Mullerat, *The Multidisciplinary Practice of Law in Europe*, 50 J. LEGAL EDUC. 481 (2000); Laurel S. Terry, *A Primer on Multidisciplinary Practices: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 883-90 (1999) (global responses to multidisciplinary practice).

12. See, e.g., Anderson, *supra* note 9, at 475. Anderson is a former American Bar Association (ABA) President and initiated the ABA Commission study of multidisciplinary practice.

13. See, e.g., Dzienkowski & Peroni, *supra* note 9, at 117-27; Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 972-73 (2000).

Another argument for multidisciplinary practice often advanced by proponents is the convenience to clients of "one-stop shopping" that multidisciplinary practice makes possible. See Dzienkowski & Peroni, *supra* note 9, at 117-18; John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1299-1300 (2000).



ing clients, client loyalty, restrictions on conflict of interest and restrictions on disclosure of client confidences.<sup>14</sup>

The most controversial form of multidisciplinary practice is what is often referred to as the fully integrated model. Under this model, a firm owned and controlled by nonlawyers provides its clients with both legal and nonlegal services, and much of the legal work is performed by lawyer employees of the firm.<sup>15</sup> Consolidated service delivery of this sort may result in greater efficiencies and cost savings and the possibility of lower legal service fees to clients.<sup>16</sup> The major accounting firms are the most frequently noted examples of fully integrated multidisciplinary practices. They provide a broad range of services to their clients that include not only conventional accounting and tax return preparation services, but also legal services required for such matters as business planning, financial planning, estate planning and litigation support, including dispute resolution, investigation and discovery.<sup>17</sup> The big accounting firms employ thousands of lawyers in the United States to provide legal services to firm clients, much of this work extending well beyond the kinds of services that accounting firms have traditionally provided their clients.<sup>18</sup> Fully integrated multidisciplinary practice

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14. See, e.g., N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at ch. 11; Fox, *supra* note 9, at 971 (Fox is a former chairman of both the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Section of Litigation); Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533 (2000) (responding to Fischel's article, *supra* note 13); David Kairys, *Some Concerns About Context and Concentration of Power*, 72 TEMP. L. REV. 1019 (1999). Also see the assessments of the rewards and risks of multidisciplinary practice in Daly, *supra* note 9, at 263-71.

The standards of professional conduct mentioned in the text just above often are referred to as the core values of the legal profession. The ABA Commission on Multidisciplinary Practice in one of its reports stresses that its pro-multidisciplinary practice recommendations safeguard the core values of the legal profession. ABA Comm'n, *August 1999 Report*, *supra* note 8, at C10-C11.

15. On the fully integrated model, see ABA Comm'n, *August 1999 Report*, *supra* note 8, at C4; Daly, *supra* note 9, at 226.

16. On the benefits claimed for multidisciplinary practice, see N.Y. State Bar Ass'n, Special Comm. on Multi-Disciplinary Practice and the Legal Profession, *Report 9-11* (Jan., 1999); Dzienkowski & Peroni, *supra* note 9, at 117-27.

17. See Terry, *supra* note 11, at 881.

18. One report numbers the total cadre of lawyers in the United States employed full-time by the Big Five accounting firms to have been about 6,000 as of 1998. Aggressive recruiting by these firms in 1999 presumably increased that number. See N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at 173-74. No doubt the number of lawyers employed by the large accounting firms in the United States has declined recently due to more stringent financial times and the near collapse of the Arthur Andersen firm.

is not, however, restricted to the big accounting firms. Other kinds of nonlawyer firms operate similarly; among them many investment banks, commercial banks, title insurance companies, management consulting firms and some smaller accounting firms. It is also possible that the multidisciplinary practice model will eventually spread to additional kinds of businesses, including such mass-customer goods or services operations as Sears Roebuck, American Express and H&R Block.<sup>19</sup>

Fully integrated multidisciplinary practice is not the only multidisciplinary services model; others are possible and have at least some adoption in this country. Common objectives of these other models are to provide an attractive alternative, both legally and competitively, to the fully integrated model typified by the big accounting firms, and also to provide an alternative that will make law firms more profitable. One of the alternatives to the fully integrated model is for a law firm to broaden its services and use firm personnel to make available not only legal services but substantial nonlegal services as well, often provided by nonlawyer specialists qualified in disciplines other than law and who are employees of the law firm. If the nonlegal services provided are extensive enough, the law firm in essence becomes a fully integrated multidisciplinary practitioner. Some law firms have moved heavily in this direction, making available nonlegal services such as urban planning and land use, accounting and financial advisory services, and using nonlawyer specialists who are employees of the firm or are retained by the firm or the client to provide most of the nonlegal services.<sup>20</sup>

A variation on the multidisciplinary practice model in which a law firm's personnel, lawyers and nonlawyer employees, provide both legal and nonlegal services to firm clients is for a law firm to share in the benefits of multidisciplinary practice by developing a

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19. See Dzienkowski & Peroni, *supra* note 9, at 127 (suggesting that permitting large retailers to hire lawyers and offer legal services at a reasonable cost could be a potentially important source of legal services for many low- and middle-income persons who presently are underserved by lawyers).

H&R Block currently is a nonlawyer mass-customer service operation for income tax preparation. Another nonlawyer mass legal service operation is We the People, a rapidly expanding document preparation service that now has over 100 offices in sixteen states. On We the People, see Lincoln Brunner, *Nonlawyer Legal Service Industry Mushrooms*, 20 LEGAL ASSISTANT TODAY 16 (Nov.-Dec. 2002); *Dishing Up Documents*, *Franchise-Style*, 88 A.B.A. J. 40 (Aug. 2002).

20. On this model, referred to as the cooperative model, see ABA Comm'n, *August 1999 Report*, *supra* note 8, at C2-C3; Daly, *supra* note 9, at 224.

special nonemployee relationship with one or more nonlawyer providers of services. The relationship may be a partnership, an ownership relationship or a relationship based on contract. Under the partnership model, the law firm and nonlawyer partners share legal fees and law firm management responsibilities.<sup>21</sup> Under the ownership model, the law firm establishes an ancillary business unit, in essence a subsidiary, that is largely owned and controlled by the law firm's partners and to which the law firm refers nonlegal work.<sup>22</sup> The essential feature of the contract model is that a law firm creates a long-term contract affiliation with an independent firm that provides nonlegal services and in which neither the law firm nor its partners have an ownership interest. Pursuant to the contract, the two firms refer matters to one another, often working together on a particular client's problems and frequently advertising the relationship in their respective markets.<sup>23</sup>

The massive market in the United States for legal services is growing and becoming more competitive as the economy expands geographically, new legal controls are introduced and more legal service providers enter the market or seek to increase their share of that market. Lawyers, the principal legal service providers, are faced with greater competition both from nonlawyers and from one another, including from lawyers not admitted to practice in states where they are providing legal services. Little empirical study attention has been given to determining with precision the consequences of this competition on lawyers and law firms in recent years but some consequences are obvious. A few examples are these: (1) many private law firms have lost an extensive amount of work as a result of corporations reducing their legal service costs by establishing or expanding their own law departments, with lawyer employees

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21. This model is often referred to as the command and control model and, where legally permissible, is subject to certain restrictions, including that the sole purpose of the partnership must be the provision of legal services. On this model, see ABA Comm'n, *August 1999 Report*, *supra* note 8, at C3; Daly, *supra* note 9, at 224-25. This model is permitted in the District of Columbia. See D.C. RULES OF PROF'L CONDUCT, R. 5.4 (2003).

22. See ABA Comm'n, *August 1999 Report*, *supra* note 8, at C3; N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at 342-59; Daly, *supra* note 9, at 225. See also Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1364-74 (2000) (describing the ancillary business operations of twenty-one different U.S. law firms). This model is also known as the law-related services/ancillary business model.

23. See ABA Comm'n, *August 1999 Report*, *supra* note 8, at C3-C4; N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at 342-59; Daly, *supra* note 9, at 225-26.

of the corporation performing much of the corporation's legal work; (2) small local law firms have lost work heavily to larger law firms that have opened branch offices and that provide a wide range of legal services, often at higher quality than their local competitors; and (3) lawyers and law firms have lost work to nonlawyers and their business and professional entities that have moved into the legal services market. In one massive legal services market in particular, nonlitigation legal services for middle- and lower-middle-income persons, lawyers appear to have made surprisingly little effort to counter nonlawyer competition by increasing efficiency and reducing legal fees.<sup>24</sup> Major structural innovations in law firms, comparable to H&R Block in tax services, have not emerged to serve the middle- and lower-middle-income legal services nonlitigation market. The attitude of many lawyers seems to be that if the competition becomes too great we will just move out of highly competitive types of practice and into other practices, instead of trying to become more competitive.

### *B. The Law of Unauthorized Law Practice*

In every state unauthorized law practice as a separate body of law is a patchwork of legal rules and concepts from a variety of sources: court rules, statutes, administrative regulations, judicial opinions, and the state's constitution.<sup>25</sup> The underlying purpose of this field of law is regulating who may provide legal services and under what circumstances. Violators of unauthorized practice laws are subject to criminal sanctions, unauthorized practice is a misde-

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24. Reliable data on this is needed but lacking. One indication that fee-cutting by lawyers to meet lay competition is going on to some extent is the evidence in *In re Opinion No. 26*, 654 A.2d 1344 (N.J. 1995). At the time of this case, the mid-1990s, real estate brokers in South Jersey were performing the legal services for most buyers and sellers of real property but for few buyers or sellers in North Jersey. In South Jersey, where lawyers had extensive competition, their average charge to buyers was \$650, to sellers \$350. In North Jersey, where the lawyers lacked competition, their average charge to buyers was \$1,000, to sellers \$750. *Id.* at 1349.

25. Some state bar associations and some larger local bar associations have unauthorized practice committees that issue occasional advisory opinions on unauthorized law practice problems. These opinions can be useful guides but have no binding legal effect.

In some states, state unauthorized practice committees, with limited enforcement powers on unauthorized law practice matters, also may issue nonbinding advisory opinions. See, e.g., N.J. R. CT., R. GEN. APPLICATION, 1.22-2(a). The New Jersey Committee is appointed by the New Jersey Supreme Court and consists of twenty-one lawyer members and four lay members. *Id.* R. 1.22-1(a). In Oregon, the attorney general issues occasional published opinions on the unauthorized practice of law.

meanor in most states,<sup>26</sup> and violators also are subject to a variety of civil sanctions, including injunction, contempt of court and inability to recover fees for unauthorized practice services rendered. Lawyers who violate unauthorized practice laws also violate their professional responsibility obligations.<sup>27</sup> Much of unauthorized practice law is highly ambiguous, uncertain, and often unclear as to who is being prohibited from performing what kinds of legal services. However, in every state there are spheres of relative clarity in the law of unauthorized law practice. These include what services are legal services, as distinct from services that only lawyers may perform; what legal services certain designated nonlawyer service groups may or may not provide and to whom; and what sanctions violators of unauthorized practice laws may incur.

Within very broad limits there is consistency among the states as to what are legal services, the kinds of services being regulated by unauthorized practice laws. As noted above, these services consist principally of preparing legal instruments, giving legal advice and appearing in a representational capacity before an adjudicatory tribunal. There may be great uncertainty as to which groups can legally provide these services and under what circumstances, but there is little uncertainty as to what services are legal services.

The objective or objectives of any particular law concerning unauthorized law practice also are usually clear either from what law makers say the law is seeking to achieve or from the obvious intent of the law. Different legal restrictions or exemptions imposed by unauthorized practice laws may have different objectives, but any such restriction or exemption is likely to have one or both of these goals: protecting consumers from incompetent or unethical legal service providers;<sup>28</sup> or assuring a market for legal services that will

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26. See, e.g., OR. REV. STAT. § 9.990 (2001) (anyone, other than an active member of the Oregon State Bar, who practices law or represents that he or she is qualified to practice law, is subject to a fine of not more than \$500 or imprisonment for a period not exceeding six months, or both); WASH. REV. CODE § 2.48.180(3) (unlawful practice of law is a gross misdemeanor and each subsequent violation a class C felony) & § 248.180(8) (Supp. 2003) (the prosecuting attorney may also seek an injunction and a civil penalty of up to five thousand dollars for each violation).

27. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (aiding the unauthorized practice of law) and R. 8.4(a) (2002) (professional misconduct); OR. CODE OF PROF'L RESPONSIBILITY, DR 1-102A(1) (professional misconduct), DR 3-101 (2002) (unlawful practice of law).

28. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (as approved by the ABA is Aug. 2002); *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 232 (Pa.

provide services of sufficient quality at a reasonable price.<sup>29</sup> An objective that some law makers may have in adopting an unauthorized practice law, although an objective they are unlikely to publicly admit as their goal, is to benefit a particular group of present or aspiring legal service providers merely because of the group's power and influence or because of the law maker's affiliation with the group.

Although there are important elements of relative clarity in the law of unauthorized law practice, there are also extensive ambiguities and uncertainties in that law, serious deficiencies given the importance of the legal service activities involved. Even defining the practice of law with sufficient certainty to be useful in determining what is the practice of law in particular situations has proven difficult.<sup>30</sup> The ambiguities in unauthorized practice law are so prevalent

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1976); Or. State Bar v. Wright, 573 P.2d 283, 286 (Or. 1977), *rev'd on other grounds*, 785 P.2d 340 (1990); Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 338-39 (Or. 1962); Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc., 635 P.2d 730, 733 (Wash. 1981).

29. See, e.g., *In re Opinion No. 26*, 654 A.2d 1344, 1346, 1359-60 (N.J. 1995).

30. A useful definition of the practice of law deserving of adoption in other states is Washington Supreme Court General Rule 24a, succinctly defining the practice of law, with certain exceptions and exclusions being listed in subsection (b) of the rule:

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
- (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

WASH. CT. R. 24(a).

A somewhat similar definition to the Washington one has recently been proposed by an ABA Task Force. See Task Force on the Model Definition of the Practice of Law, ABA Ctr. for Prof'l Responsibility, Draft (Sept. 18, 2002). Also see Oregon State Bar Board of Governors Policies, Rule 9.700A(2), concerning the duties of the State Bar's Unlawful Practice of Law Committee, stating in part:

The practice of law includes, but is not limited to, any of the following: (1) holding oneself out, in any manner, as an attorney or lawyer authorized to practice law in the State of Oregon; (2) appearing, personally or otherwise, on behalf of another in any judicial or administrative proceeding; (3) providing advice or service to another on any matter involving the application of legal principles to rights, du-

that in every state there are troublesome doubts in the law as to the legal service performance rights of many occupational groups other than lawyers, but also of lawyers' and law firms' rights in two very important areas of their practice: multijurisdictional practice and multidisciplinary practice. The usual unauthorized practice regulatory pattern is one common to most fields of law: some very broad general rules and a set of sub-rules or binding interpretations amplifying and qualifying the principles laid down in the general rules. The problem is that most of the general rules are so broad that they need clarification, and the clarification that has been provided has been inadequate. Without clarification, some of the general rules are too vague to have much meaning, and applying some of them literally could have highly undesirable consequences.

For example, a common general rule in the law of unauthorized practice is that only lawyers admitted to practice in a particular state may practice law in that state.<sup>31</sup> But what does this rule mean? Does it prohibit nonlawyers from providing any kind of legal services to others under any circumstances? Does it prohibit bankers from telling customers what the legal risks are of not paying loan obligations, or social workers from informing their clients of the clients' welfare and social security rights, or a third-year law student from preparing a residential lease for the student's parents? Another general rule adopted in some states is that certain designated occupations, usually certain state-licensed occupations, may perform legal services incidental to the usual nonlegal services provided by that occupation.<sup>32</sup> But precisely what services are incidental? For in-

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ties, obligations or liabilities.

OR. STATE BAR BD. OF GOVERNORS POL'YS R. 9.700A(2) (2002).

On the difficulty of defining the practice of law, see N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9, at 301-03.

31. See, e.g., CAL. BUS. & PROF. CODE § 6125 (West Supp. 2002); N.Y. JUDICIARY LAW § 478 (West 2002); OR. REV. STAT. §§ 9.160 & 9.320 (2001); MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (the pre-2002 version that is currently in effect in most states) (prohibiting lawyers from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction). The 2002 revision of Model Rule 5.5 expands considerably lawyer multijurisdictional practice rights. See *infra* note 60.

32. See, e.g., Pope County Bar Ass'n, Inc. v. Suggs, 624 S.W.2d 828, 831-32 (Ark. 1981); Pulse v. N. Am. Land Title Co. of Mont., 707 P.2d 1105, 1109-10 (Mont. 1985); *In re Bercu*, 78 N.Y.S.2d 209, 220 (N.Y. App. 1948), *aff'd without opinion*, 87 N.E.2d 451 (1949) (accountant engaged in the unauthorized practice of law when he gave legal advice on a federal income tax question that was not incidental to bookkeeping, auditing or tax preparation work performed for the client). But cf. Or. State Bar v. John H. Miller & Co., 385 P.2d 181, 182 (Or. 1963) (responding to defendants' argument that the legal advice given

stance, if made applicable to licensed real estate brokers, does it include preparation of each and every kind of legal document common to residential real estate transactions and also to the closing of those transactions? And does it apply to the brokers preparing documents in complex commercial real estate transactions and closing those kinds of transactions?

Still another very abstract rule with some adoption is that it is the unauthorized practice of law for nonlawyers to advise others on difficult or doubtful legal questions.<sup>33</sup> Analogous to the difficult or doubtful legal question test is the one that prohibits nonlawyers from providing legal services to others that require legal skill or knowledge or more than ordinary business intelligence.<sup>34</sup> Then there is the test, so vague as to be almost meaningless, that the practice of law is what is commonly known as the practice of law.<sup>35</sup> Ambiguity is an obvious and particularly troublesome feature of much unauthorized practice law.

There are, of course, segments of unauthorized practice law in every state that are sufficiently clear and precise as to leave little doubt over the law's intended meaning. For example, in all states it is clear that individuals, natural persons as distinct from corporations and other organizations, may perform legal services for themselves, so-called *pro se* representation, including self-representation in court proceedings.<sup>36</sup> Also, the federal government has intervened

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customers by its insurance sales and estate planning business was merely incidental to that business and hence not the unauthorized practice of law, the court stated: "To fall outside the proscription of the statute [prohibiting the unauthorized practice of law] the legal element must not only be incidental, it must be insubstantial. It cannot be said that one who plans another person's estate employs the law only in an insubstantial way."); *Or. State Bar v. Sec. Escrows, Inc.*, 377 P.2d 334, 339 (Or. 1962) (rejecting the incidental test).

33. *See, e.g.*, *Baron v. City of Los Angeles*, 469 P.2d 353, 358 (Cal. 1970); *Cardinal v. Merrill Lynch Realty/Burnet*, 433 N.W.2d 864, 868-69 (Minn. 1988).

34. *See Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771, 774-75 (Ill. 1966) (applying this test in holding a real estate broker to be engaged in unauthorized law practice when preparing real estate transaction documents for others).

35. *See, e.g.*, *Grievance Comm. of Bar of New Haven County v. Payne*, 22 A.2d 623, 626 (Conn. 1941) (cited with approval in *State Bar Ass'n v. Conn. Bank & Trust Co.*, 140 A.2d 863, 870 (Conn. 1958), and *Taft v. Amsel*, 180 A.2d 756, 757 (Conn. Super. Ct. 1962)).

36. On the right of *pro se* representation generally, see WOLFRAM, *supra* note 1, at 803-06. For the right of *pro se* representation in Oregon, see OR. REV. STAT. §§ 9.160 & 9.320 (2001) and *Oregon Peaceworks Green, PAC v. Secretary of State*, 810 P.2d 836 (Or. 1991), *on remand*, 814 P.2d 190 (Or. Ct. App. 1991) (holding nonattorney officer of an unincorporated political action committee not permitted to represent the committee in state court litigation proceedings).



in a few aspects of unauthorized practice law to permit nonlawyer performance of legal services in some clearly ascertainable situations, including the right of designated nonlawyers to represent clients before certain federal administrative agencies.<sup>37</sup> Additional examples are the scattering of laws in most every state that clearly set forth certain legal services that may or in some circumstances may not be performed by specified nonlawyer occupations. Many laws pertaining to unauthorized law practice are occupation-specific,<sup>38</sup> but

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37. See, e.g., 31 C.F.R. § 10.3 (2001) (attorneys, certified public accountants and enrolled agents, and actuaries may practice before the U.S. Internal Revenue Service); 37 C.F.R. § 10.6 (2001) (qualifying attorneys and nonattorney agents may practice before the U.S. Patent and Trademark Office on patent matters). See also *State ex rel. Juvenile Dep't of Lane County v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993) (holding that in proceedings for an Indian child's custody, the federal government's Indian Child Custody Act preempts Oregon statutory requirements that intervenors be represented by an attorney).

38. See, e.g., ARIZ. CONST. art. 26, § 1 (authorizing licensed real estate brokers to draft or fill out essential documents in real estate transactions when acting as brokers or salespersons); N.C. GEN. STAT. § 58-70-120 (2001) (prohibiting practice of law by nonattorney collection agency representatives); OR. REV. STAT. § 9.166(2) (2001) (holding that licensed real estate brokers in arranging real estate transactions are not engaged in the unauthorized practice of law); *Id.* § 9.280 (holding that persons who act as immigration consultants for compensation, and who are not active members of the Oregon State Bar, are engaged in the unauthorized practice of law); *Id.* § 52.060 (allowing nonlawyer to act as attorney for others in justice court); S.C. APP. CT. R. 414 (authorizing limited certification rights for certain law school clinical law teachers to provide legal services); WASH. CT. R. 12 (Admission to Practice) (authorizing lay closing officers to select, prepare and complete certain legal documents incident to the closing of real estate and personal property transactions); *In re Opinion No. 26*, 654 A.2d 1344 (N.J. 1995) (holding that after informed consent by the clients, real estate brokers and title companies may prepare real estate conveyancing documents and close real estate transactions); *In re Application of N.J. Soc'y of Certified Pub. Accountants*, 507 A.2d 711 (N.J. 1986) (holding that subject to certain restrictions, CPAs may prepare New Jersey inheritance tax returns); *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612 (S.C. 2002) (determining what kinds of legal services may be performed by different kinds of insurance adjusters).

There have been some reported Oregon judicial opinions on unauthorized practice of law by nonlawyers. Most of these cases involve nonlawyers selling legal documents and giving advice on their use to their customers or drafting legal instruments for their customers. See, e.g., *In re Morin*, 878 P.2d 393 (Or. 1994) (holding that nonlawyer paralegals employed by an attorney selling living trusts were engaged in the unauthorized practice of law when they gave legal advice to customers and selected legal documents to meet customer needs; attorney disbarred); *Or. State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975) (holding nonlawyers selling do-it-yourself kits were illegally practicing law when advising customers of their legal rights and advising or assisting customers in filling out divorce kit forms, but advertising and selling the kits was legally permissible); *Or. State Bar v. John H. Miller & Co., Inc.*, 385 P.2d 181, 184 (Or. 1963) (holding that estate planning and insurance sales company and its president engaged in the unauthorized practice of law and were "enjoined from preparing estate plans embodying legal analysis either as a separate service or as an incident to carrying on the business of selling insurance"); *Or. State Bar v. Sec. Escrows*,

the details vary from state to state. Many of the detailed occupation-specific legal pronouncements as to what is and is not unauthorized law practice appear in judicial opinions; but some appear in court rules, statutes, and very occasionally in state constitutions.<sup>39</sup>

Some detailed laws as to the legal limits on lawyer multijurisdictional practice also appear in the laws of some states, frequently in case law and court rules. Some of these are very restrictive,<sup>40</sup> others more liberal as to the rights of out-of-state lawyers.<sup>41</sup> Quite universally, out-of-state lawyers, with proper court approval, may appear *pro hac vice* before the courts of a state where they are not admitted.<sup>42</sup> A few states have adopted a position similar to that of the Restatement<sup>43</sup> and permit an out-of-state lawyer to provide such client services in their state as client consultation, client advice, fact investigation, and settlement negotiations if these services are principally related to an out-of-state judicial or administrative proceeding or out-of-state client.<sup>44</sup> Also, the law in about one-fourth of the

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Inc., 377 P.2d 334, 340 (1962) (holding that escrow companies and their nonlawyer employees were illegally engaged in the practice of law when exercising discretion in selecting and preparing legal instruments for customers, but that "filling in of blanks [in a legal instrument] under the direction of a customer upon a form or forms selected by the customer" was legally permissible); Or. State Bar v. Smith, 942 P.2d 793 (Or. 1997) (holding that nonlawyers operating a paralegal service that made legal forms available to customers were engaged in the unauthorized practice of law in advising customers of their legal rights and an injunction prohibiting this conduct does not violate Oregon or U.S. Constitution free speech and free expression rights). On unauthorized practice of law by real estate brokers in Oregon, including discussion of Oregon Revised Statutes section 166.2, see Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 917-24 (1996). On Oregon unauthorized practice of law as to another occupation-specific group, see Therese M. Wandling, Note, *Divorce Kits and Unauthorized Practice*, 55 OR. L. REV. 408 (1976).

39. See, e.g., sources cited *supra* note 38.

40. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). The California Legislature subsequently eased somewhat the effect of this case by permitting attorneys admitted in other states, but not California, to represent parties in arbitration proceedings in California. CAL. CIV. PROC. CODE § 1282.4.

41. See, e.g., MICH. COMP. LAWS ANN. § 600.916 (West Supp. 2002) (prohibiting practice of law by persons not regularly licensed and authorized to practice in Michigan but adding: "This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter.").

42. See, e.g., CONN. SUPER. CT. R. § 2-16; N.Y. CT. APP. R. § 520.11; OR. REV. STAT. § 9.241(2) (2001). See also MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2002).

43. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (1998).

44. See, e.g., MICH. COMP. LAWS ANN. § 600.916 (West Supp. 2002-2003).

states now expressly authorizes house counsel whose principal office is in the state, although not licensed to practice law in the state, the right to provide legal services to their employer.<sup>45</sup> The house coun-

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A comparable position to that of the Restatement has been approved by the ABA in its 2002 revision of the Model Rules of Professional Conduct. Model Rules of Professional Conduct Rule 5.5(b)(2)(ii) provides that a lawyer may act "with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice." The commentary to Rule 5.5 states, "This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, appearances in administrative or rule-making proceedings or before tribunals for which pro hac vice admissions are unavailable, and participation in alternative dispute-resolution proceedings." This Model Rule, of course, will be effective only in states that adopt it.

A possible variant of liberalized multijurisdictional law practice is the easing of bar admission restrictions regionally by a reciprocal agreement among states in a region. This approach recently was adopted by Oregon, Washington, and Idaho. Each of these states now will admit a lawyer to practice in their state without taking their state's bar examination if the lawyer currently is admitted to practice in one of the other two states. The Oregon tri-state reciprocity admission rule is found in Oregon Rules of Court, Rule 1505. It provides in part:

(1) Lawyers who have taken and passed the Idaho and/or Washington bar examinations, who are active members of either or both of those state bars as a result of the passage of those examinations, and who have actively, substantially and continuously practiced law in one or both of these states for no less than three years immediately preceding their application for admission under this rule may be admitted to the practice of law in Oregon without having to take and pass the Oregon bar examination, subject to the requirements of this rule.

OR. CT. R. 1505 (Admission of Attorneys in Oregon). The Oregon rule also imposes some competence and moral fitness requirements on applicants. The Washington and Idaho rules are similar to the Oregon rule.

45. See Needham, *Permitting Lawyers*, *supra* note 7, at 1356-58 (considering recent changes in state laws concerning out-of-state house counsel and citing the rules or statutes in fifteen states authorizing out-of-state house counsel to provide legal services to their employer). Oregon recently joined this list. See OR. CT. R. 1605 (Admission) (adopted effective Nov. 1, 2001). On this rule, see also George A. Riemer, *New Admission Rule*, 62 OR. ST. B. BULL. 23 (June 2002). The 2002 revision in the ABA Model Rules of Professional Conduct Rule 5.5 also authorizes such services by house counsel in states where the rule is adopted. Revised Model Rule 5.5(d)(1) now provides:

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;

MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2002).

Comment 16 to Rule 5.5 states that Rule 5.5(d)(1)

applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the

sel, however, must be licensed to practice law in another state, and court appearances generally are not permitted. Although much of the law as to the validity of multidisciplinary practice remains murky, a few states have recently adopted laws directed at particular models of multidisciplinary practice that have added considerable clarity and certainty to some aspects of this controversial type of practice. For example, the New York courts, by court rule, have added a section to the Code of Professional Responsibility, applicable to New York lawyers, that with certain provisos, permits continuing contractual relationships between law firms and nonlegal professionals for providing clients with legal and nonlegal services.<sup>46</sup> The new rule became effective on November 1, 2001. Another example is that the courts in a small number of states have recently adopted a new provision in their professional conduct rules that would permit lawyers and law firms to perform limited nonlegal services ancillary to the practice of law.<sup>47</sup> Another clear aspect of unauthorized practice law involving conduct of lawyers is that lawyers, under the sanction of suspension from law practice, are prohibited from providing legal services to others and may receive an additional sanction for doing so.<sup>48</sup>

A highly important aspect of contemporary unauthorized practice law is that whether the law is relatively clear or is ambiguous, since the 1970s there has been a marked decline in efforts to enforce this law despite extensive and apparent noncompliance. Criminal prosecutions for unauthorized law practice violations have been almost nonexistent,<sup>49</sup> and in every state, civil actions against violators

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client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

46. See N.Y. CODE OF PROF'L RESPONSIBILITY § 1200.5-c(a). If certain conditions are met, "a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal services."

47. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (2002) (particularly cmt. 9) (this change was originally approved and recommended by the ABA in 1994.). States that have adopted this rule are Pennsylvania, Maine, North Dakota, Indiana, and Massachusetts. See Daly, *supra* note 9, at 246 n.116.

48. See, e.g., *In re Devers*, 974 P.2d 191 (Or. 1999) (attorney disbarred); *In re Jones*, 825 P.2d 1365 (Or. 1992) (attorney disbarred); *State ex rel. Or. State Bar v. Lenske*, 407 P.2d 250 (Or. 1965) (attorney held in criminal contempt).

49. Even in the 1970s and before, there were few reported criminal cases against those alleged to be engaged in the unauthorized practice of law. Among such earlier cases were *Huber v. State*, 216 S.E.2d 73 (Ga. 1975) (holding that a nonlawyer appearing on behalf of

have been rare.<sup>50</sup> Lack of enforcement of unauthorized practice law has not only encouraged noncompliance but has contributed to the uncertainty in the law, as opinions from enforcement proceedings before adjudicatory bodies are a major source of enhanced clarification of the law.

### *C. Why the Deficiencies in the Law of Unauthorized Law Practice?*

The law of unauthorized practice currently is seriously deficient in that noncompliance is extensive, enforcement efforts are largely lacking and major segments of the law are ambiguous and uncertain. These deficiencies exist in the unauthorized practice law of every state but with variation from state to state in the scope and severity of the deficiencies. Who is legally authorized to practice law and who is excluded from doing so are of great importance to the effectiveness of any legal system; so why the current deficiencies? A major reason is failure in recent years by the legal profession, especially bar associations, to more actively and aggressively push for either clarification or enforcement of unauthorized practice laws. There was a period in the mid-twentieth century, up to the 1970s, in which the American Bar Association (ABA) and many of the state bar associations were very active and often successful in seeking and achieving more explicit, comprehensive and vigorously enforced unauthorized practice laws.<sup>51</sup> These efforts were directed not only against nonlawyers providing legal services but also against lawyers seeking to provide such services in states where they were not ad-

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another before a justice of the peace court committed a misdemeanor); *State v. Bander*, 265 A.2d 671 (N.J. 1970) (holding that a real estate broker, in drawing legal documents in a real estate transaction, did not violate a criminal statute, reversing a lower court conviction); *State ex rel. Or. State Bar v. Lenske*, 407 P.2d 250 (Or. 1965) (holding that an attorney practicing law while under suspension was in criminal contempt and fined \$500, with imprisonment ordered if fine was not paid); and *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962) (holding that a nonlawyer preparing real estate documents for sales made by his employer did not violate a criminal statute, reversing a lower court conviction).

50. Although there have been few legal proceedings, civil or criminal, brought against unauthorized practice violators in any state, threats of such proceedings by prosecutors, bar association committees and others have occurred occasionally and have had some effect in deterring unauthorized practice activities. However, these threats and their consequences usually are not made public.

51. On the history of unauthorized practice regulation and enforcement in the United States, see WOLFRAM, *supra* note 1, at 824-26; ABA Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations* 16-32 (1995); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 161-201 (1980).

mitted to practice.<sup>52</sup> Client protection from incompetent, unethical and disloyal legal service providers was commonly advanced as the reason for the bar's intervention.<sup>53</sup> But self-interest was also implicit in much of this bar intervention, a recognition that lawyers, especially in-state lawyers, are major beneficiaries of unauthorized practice laws, laws that expand and strengthen the bar's monopoly over legal services.

But why has the organized bar, starting a quarter-century or so ago, substantially cut back on its efforts both to expand and clarify what legally constitutes unauthorized law practice and to achieve greater compliance with that law? Efforts have not entirely ceased but have been greatly curtailed. Opposing unauthorized law practice no longer is a crusade, as it had been to some bar associations in the past. Despite flagrant and persistent violations in most states, relatively little effort has been made in recent years to enforce unauthorized practice laws.<sup>54</sup> One explanation for this very marked curtailment of enforcement effort is the increased popular acceptance of the concept that a free and open market, with few restraints imposed by government, is the preferred type of economy for providing goods and services. Legally protected monopolies, including the lawyers' monopoly, are anathema to this free and open market ideology; and those seeking to protect such monopolies are seen by many as acting against the public interest.<sup>55</sup> Protecting the lawyers' monopoly has been particularly difficult to justify when the bar has failed to provide hard evidence of actual injury to consumers or others from encroachment into the legal services market by many of its nonlawyer competitors.<sup>56</sup>

Other factors that appear to have influenced the organized bar

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52. See, e.g., *In re Roel*, 144 N.E.2d 24 (N.Y. 1957); *State ex rel. Ayamo v. State Bd. of Governors of Wash. State Bar Ass'n*, 167 P.2d 674 (Wash. 1946).

53. See, e.g., *Gardner v. Conway*, 48 N.W.2d 788, 795 (Minn. 1951) (plaintiffs were members of a county bar association committee on the practice of law); *W. Va. State Bar v. Earley*, 109 S.E.2d 420, 435 (W. Va. 1959).

54. On the decline in enforcement of unauthorized practice laws, see ABA Comm'n on Nonlawyer Practice, *supra* note 51, at 23-32; Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209, 216-17 (1990).

55. See, e.g., *Dzienkowski & Peroni*, *supra* note 9, at 89; Fischel, *supra* note 13, at 955-58.

56. Christensen makes this point in his oft-cited article published some years ago. See Christensen, *supra* note 51, at 210-12. Others have made the same point in arguing for the law to permit more consumer choice in seeking legal services. See, e.g., WOLFRAM, *supra* note 1, at 828-31.

to de-emphasize the unauthorized practice issue are the increased economic resources and political influence of the bar's major competitors. As these competitors have become more numerous and have increased their encroachment into the legal services market, trying to dislodge them by judicial or legislative-type action becomes a more difficult and financially expensive undertaking and, if attempted, presents a risk of losing.<sup>57</sup>

An additional factor that appears to have contributed to the organized bar reducing its anti-unauthorized practice efforts is increased division within the legal profession over how broad unauthorized practice laws should be and whether or not certain groups should be restricted by these laws. In particular, there has been a growing division within the legal profession on what should be done about current legal restrictions on both multijurisdictional law practice and multidisciplinary practice. When their memberships are seriously split on an issue, bar associations are reluctant to take action on the issue. Both multijurisdictional and multidisciplinary practice have increasingly caused divisions within the bar as more lawyers have become engaged in and profited from these kinds of practices. However, many other lawyers consider their practices threatened by the multijurisdictional and multidisciplinary practitioners. Such acute divisions deter aggressive action by bar associations to either enforce or seek to revise the laws involved.

Another significant reason for current deficiencies in unauthorized practice law, especially the extensive ambiguity in much of that law, is a lack of action to reform or clarify the law of unauthorized practice by lawyers' competitors, against whom this law is principally directed. Lawyers' competitors have been remarkably quiescent on the issue, given what is at stake for them. They have defended when legal proceedings have been brought against them charging violations of unauthorized practice laws, but have done little else in recent years to make unauthorized practice laws more in accord with their interests. They have not publicly declared the reasons for this hands-off position, but, given what they have been do-

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57. The legal fees and other litigation expenses for a bar association or law firm to bring an unauthorized practice enforcement case against a major nonlawyer competitor can readily run into six figures, as these cases are likely to be vigorously defended, appeals are probable and defense by the bar's opponents is frequently intensified by financial and amicus brief support from their trade associations. Pro bono representation is a possible option but a bitterly contested major case may require more time than law firms are willing to give pro bono, or pro bono volunteers may not be the best qualified counsel.

ing and the responses they have been receiving, the explanation seems obvious.

The reasoning of the lawyers' competitors seems to be as follows: We are moving into the legal services market and getting much of what we want without engaging in costly and chancy efforts to liberalize the law in our favor, so why try to force legal change? Why gamble on legal setbacks? Lawyers are doing little through the law to block our encroachment into the legal services market, consumers of legal services are showing little interest in the unauthorized practice issue, and courts and other government agencies seem unlikely to modify unauthorized practice laws on their own initiative—so, for the present we will not try to force change in the law. Moreover, as over time we become even more established in the legal services market, it may become impossible to attract the support needed to displace us from that market. An established and perpetuated status quo is very much in our favor. Whether lawyers' competitors will continue this quiescent approach to the unauthorized law practice issue remains to be seen. They may ultimately be forced to take a much more active role or eventually conclude that legal change in their favor is so assured that they will aggressively seek such change.

*D. Is a More Active Era Emerging in the Reform and Enforcement of Laws on Unauthorized Law Practice?*

The prolonged and relatively quiescent period in reforming and enforcing unauthorized practice law may be coming to an end. The market for legal services is too important for so much of the law as to who may participate in that market to remain indefinitely so ambiguous, uncertain and unenforced. All major social issues go through cycles of issue-attention.<sup>58</sup> The down-phase of attention to unauthorized practice law has been unusually protracted for such an important issue, but there are signs that this down-phase may be ending. Efforts to achieve change are coming mostly from within the legal profession, especially the bar associations, the traditional source for new and more intensified attempts to set effective legal limits on who may legally engage in delivery of legal services.

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58. See Anthony Downs, *The Issue-Attention Cycle and the Political Economy of Improving Our Environment*, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROL* 9 (Joe S. Bain & Warren F. Ilchman eds., 1972). See also B. Guy Peters & Brian W. Hogwood, *In Search of the Issue-Attention Cycle*, 47 J. POL. 238 (1985).



However, these recent change efforts by the legal profession have been largely limited to multijurisdictional practice and multidisciplinary practice.

What triggered these efforts by the bar to more actively deal with the unauthorized law practice problems of multijurisdictional practice and multidisciplinary practice? What attracted the necessary attention to generate serious demands for legal change from influential segments of the profession? Rapid escalation in issue-attention on any important issue commonly is sparked by a single event. And this event may be one whose occurrence was difficult to predict much in advance and, if predictable, whose explosive effect in intensifying broader concerns in many quarters was not expected. Two quite separate events were the instigating occurrences that generated extensive concern within the bar as to multijurisdictional practice and multidisciplinary practice. One of these events was the *Birbrower v. Superior Court* case, a 1998 California Supreme Court opinion that, in its holding and dictum, drastically restricted the legal rights of out-of-state lawyers to engage in multijurisdictional practice in California, with severe sanctions possible for violations.<sup>59</sup> The shock effect of *Birbrower* was acute and widespread. It underscored the risks to multijurisdictional practice and that lax enforcement of restrictions on this phase of law practice may be ending. Lawyers in all states are vividly reminded of their vulnerability when they engage in multijurisdictional practice, as most state unauthorized practice laws could quite conceivably be given exclusionary interpretations similar to those that *Birbrower* gave to California's laws. The response to *Birbrower* has been a major move to clarify and modify multijurisdictional laws, led by the ABA.<sup>60</sup> The post-

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59. *Birbrower, Montalbano, Condon, & Frank v. Superior Court*, 949 P.2d 1, 12-13 (Cal. 1998). The sanction imposed in this case was no fees to the out-of-state lawyers for the legal services they provided in California. *Id.*

60. At its annual meeting in 2002, the ABA revised Rule 5.5 of its Model Rules of Professional Conduct to permit much more extensive multijurisdictional practice by lawyers. Revised Model Rule 5.5(c) provides as follows:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or

*Birbrower* reaction also has been a contributing factor to some states modifying their laws to permit house counsel based in the state, but not admitted there, to provide legal services to the house counsel's employer.<sup>61</sup>

What triggered intensified concern by the bar with multidisciplinary practice were proposals by an ABA Commission, the Commission on Multidisciplinary Practice. The Commission was appointed in 1998 by Philip Anderson, then-President of the ABA, with little apparent demand by the Association's membership for consideration of or action on the multidisciplinary practice issue.<sup>62</sup> The Commission made an intensive study of the multidisciplinary practice issue, held a number of hearings, published a background study on multidisciplinary practice and issued two reports, one in 1999 and one in 2000, each with recommendations.<sup>63</sup> The Commission proposed that the legal restrictions on multidisciplinary practice be eased considerably and that, with substantial precautionary limits, most forms of multidisciplinary practice legally be permitted, including, apparently, a fully integrated form very favorable to accounting firms and other nonlawyer organizations.<sup>64</sup> The reports and recom-

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reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2002). This rule will not be legally binding in any state until adopted by the law-making authorities of that state.

The pre-2002 Rule 5.5 of the Model Rules of Professional Conduct is substantially the same as the Model Code of Professional Responsibility Disciplinary Rule (DR) 3-101. Presumably, the Code states will be giving serious consideration to amending DR 3-101 to conform to ABA Model Rule 5.5.

61. On state law modifications favorable to house counsel, see *supra* note 45 and accompanying text.

62. On Mr. Anderson's motivations for appointing the Commission and his reactions to its recommendation ultimately being rejected by the ABA, see Anderson, *supra* note 9, at 473-74.

63. See ABA Comm'n on Multidisciplinary Practice, *supra* note 9.

64. The Commission's 1999 recommendations are much more extensive than those it made in 2000. The reason for the more limited recommendations seemingly was the hope that this would enhance the prospects for their adoption by the House of Delegates. Both the 1999 and 2000 recommendations propose that they be implemented by amending the ABA

mentations created extensive commentary and controversy within the legal profession and ultimately, at its 2000 annual meeting, the ABA's House of Delegates rejected its Commission's recommendations, by a three-to-one voting margin, and dismissed the Commission.<sup>65</sup> The controversy over multidisciplinary practice generated by the ABA Commission's recommendations also spread to state and larger local bar associations, to the point that many of these associations took a position on the multidisciplinary practice issue, with some favoring legal validation of one or more forms of multidisciplinary practice that are now prohibited.<sup>66</sup>

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Model Rules of Professional Conduct. The Commission's 2000 recommendations, ABA Comm'n, *May 2000 Report*, *supra* note 9, at 1, are as follows:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services [Multidisciplinary Practice], provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.
2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations.
3. To protect the public interest, regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement the principles identified in this recommendation.
4. This recommendation does not alter the prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct.
5. Nor does it authorize passive investment in a Multidisciplinary Practice.

65. See John Gibeaut, *'It's a Done Deal,' House of Delegates Vote Crushes Chances for Multidisciplinary Practice*, 86 A.B.A. J. 92 (Sept. 2000).

Influencing the ABA House of Delegates' vote against the Commission's recommendations and reflecting many of the opposition's arguments was the lengthy study and analysis of multidisciplinary practice by a New York State Bar Association Committee. See N.Y. State Bar Ass'n, *April 2000 Report*, *supra* note 9.

66. See Robert K. Christensen, Comment, *At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulating the Legal Profession*, 2001 BYU L. REV. 375, 380-82 (2001) (discussing state and local bar association responses to the multidisciplinary practice issue). The action of the Connecticut Bar Association on the multidisciplinary practice issue may be fairly typical: appointment of a Study Committee on Multidisciplinary Practice, extended examination of the problem by the Committee, a detailed Committee report recommending further study and monitoring developments elsewhere, and eventual disbanding of the committee due to lack of interest and concern. See Conn. Bar Ass'n, Study Comm. on Multidisciplinary Practice, *Report* (May 2000). The

So far, however, the renewed interest in multidisciplinary practice has produced almost no change in the law as to what aspects of multidisciplinary practice are or are not legally permissible. Moreover, the renewed interest in multidisciplinary practice has declined; the issue-attention cycle has moved downward. This decline is attributable in part to the Enron collapse, with its negative consequences for one of the Big Five accounting firms, Arthur Andersen, and to the subsequent disclosures of improper and illegal behavior by other accountants and consultants. Enron and its after-effects seem to have postponed, at least for the near-term, major efforts to appreciably ease the legal restrictions on multidisciplinary practice.<sup>67</sup> As a result of accountants' actions in Enron's operations and similar matters, questions have arisen as to whether accounting firms should legally be permitted to perform diverse kinds of services for their clients when doing so creates loyalty and conflict-of-interest problems that can be very damaging to clients. Legal services obviously are one kind of service that, when provided by an accounting firm or any other kind of multidisciplinary service provider, can pose these kinds of risks. Recently, new restrictions have been imposed by Congress on accounting firms,<sup>68</sup> and more are possible. The national mood currently is unreceptive to expanded multidisciplinary practice by firms owned or controlled by nonlawyers or the legalization of these practices by such firms. How long this mood will continue remains to be seen.

Despite the cooling-off effect of Enron and similar incidents on efforts to remove many of the legal restrictions on multidisciplinary practice, some momentum remains to reform and enforce other aspects of unauthorized practice law. Support for reducing many states' legal restraints on multijurisdictional practice by lawyers remains strong, and it seems fairly certain that a number of states will soon ease their restrictions on this kind of law practice. More states

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Oregon State Bar has considered the multidisciplinary practice issue but taken no action; multidisciplinary practice is now a dead issue as far as the State Bar is concerned.

67. See, e.g., Davis, *supra* note 9, at 45.

68. In mid-2000, Congress passed the Corporate Fraud Accountability Act of 2000 (Sarbanes-Oxley), Pub. L. No. 107-204, 116 Stat. 745 (2000). This long and detailed statute imposes new restrictions on accountants, including restrictions on an accounting firm performing auditing and some consulting services for the same client. See *id.* at § 201. Among other provisions, it imposes new obligations on lawyers for corporations to report evidence of securities law violations, increases criminal penalties for securities fraud, increases corporate financial disclosure obligations and prohibits most corporate loans to senior corporate executives. Sarbanes-Oxley Act, 116 Stat. 745.

also are likely soon to legally authorize house counsel based in a state to provide legal services to their employer, although the house counsel are not licensed to practice in that state. New entrants into the legal services market, especially new entrants lacking much economic or political power, will probably be increasingly vulnerable to bar-sponsored enforcement proceedings being brought against them charging them with unauthorized practice of law.

The remainder of this Article considers in some detail the power of state courts over unauthorized law practice and the possible implications this has for future law enforcement and law reform in this field of law. State courts have been and will continue to be of major importance in imposing and enforcing legal restraints on unauthorized practice of law and, in most states, will likely continue to be the ultimate determinants of the legal scope and effectiveness of these restraints.

## II. THE SCOPE OF STATE COURT LEGAL POWER OVER UNAUTHORIZED LAW PRACTICE

The source of legal power<sup>69</sup> of each branch of state government over any matters, unauthorized law practice matters included, is the state's constitution. What power is allocated to each branch often depends on interpretations of the amorphous constitutional concept of separation of powers and how that concept is amplified and interpreted in each state. Unlike the Federal Constitution, most state constitutions have express separation of powers provisions, usually phrased in very general terms.<sup>70</sup> Ten states have no explicit separa-

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69. Power, as the term is used in this Article, means the legal authority to do certain acts. For other meanings of power, see M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 13 (2d ed. 1998).

70. On separation of powers provisions in state constitutions, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190-1216 (1999). In its generality, the Oregon Constitution separation of powers section is typical of that of many states. Oregon Constitution, article III, section 1 provides:

Section 1. Separation of powers. The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

See also the very general power allocation to each department by the Oregon Constitution: art. IV, § 17 (legislative assembly); art. V, § 1 (governor); art. VII, § 1 (the courts). And

tion of powers clause in their constitution, but separation of powers is inferred from the constitutional power allocation to each branch, analogous to the approach taken in interpreting the United States Constitution.<sup>71</sup> Most state constitutions are much more detailed than the United States Constitution, and some states supplement separation of powers as the source of judicial power by adding more explicit provisions.<sup>72</sup>

Courts often rely on the concept of inherent power in determining the scope of their authority.<sup>73</sup> In very general terms, this power includes the authority to carry out the courts' essential operations and to fulfill their responsibilities. More particularly, this includes the power over court governance, implementation of adjudication, logistical support of the courts and enforcement procedures.<sup>74</sup> Some

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see Joseph D. Robertson & John H. Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L. REV. 273 (1977).

71. States without an explicit separation of powers clause in their constitutions are Alaska, Delaware, Hawaii, Kansas, New York, North Dakota, Ohio, Pennsylvania, Washington and Wisconsin. For a discussion of separation of powers provisions in state constitutions, see Rossi, *supra* note 70, at 1190-91.

72. See, e.g., FLA. CONST. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."); N.D. CONST. art. VI, § 3 ("The supreme court shall have authority . . . , unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law.").

73. On inherent judicial power see FELIX F. STUMPF, NATIONAL JUDICIAL COLLEGE, *INHERENT POWERS OF THE COURTS, SWORD AND SHIELD OF THE JUDICIARY* (1994); WOLFRAM, *supra* note 1, at 22-33 (1986); Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); Robertson & Buehler, *supra* note 70, at 274-79; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989-90) [hereinafter Wolfram, *Lawyer Turf*].

74. This is Stumpf's categorization and under each of these categories he lists many types of situations, with at least some case law authority, over which courts have been held to have inherent power. STUMPF, *supra* note 73, at iii-vi. For example, under court governance he lists power to punish for contempt, power to make rules, power to govern and regulate the bar and the practice of law (e.g., regulating admission, practice, discipline and compensation of counsel to represent indigents) and power to manage and regulate the court system (e.g., the conduct of the judiciary). *Id.* at iii-vi.

The Wisconsin Supreme Court, in a recent opinion, lists three areas of judicial inherent power: internal court operations, regulation of the bench and bar, and ensuring that the courts function efficiently and effectively to provide fair administration of justice. *City of Sun Prairie v. Davis*, 595 N.W.2d 635, 640-41 (Wis. 1999). In its discussion of inherent power, the Wisconsin court adds that the courts have exclusive authority over some kinds of inherent power and share other kinds with the executive or legislative branch. *Id.* at 640.

judicial opinions expressly declare that the inherent power concept is constitutionally based and use the concept to interpret and delimit the state constitution's separation of powers requirement as applied to the courts.<sup>75</sup> In many other judicial opinions in which the courts rely on the inherent power concept in their reasoning, no reference to the concept's constitutional source is made, apparently assuming that it is constitutionally based.<sup>76</sup> But whatever the conceptual reasoning applied, it is generally recognized that state courts have the last word in interpreting their state's constitution.<sup>77</sup> The latest interpretation of a state constitution's meaning by the state's supreme court is considered binding law. Some may consciously violate what the court's interpretation requires. Others may try to have the interpretation reversed by subsequent court action, but the final interpretive authority of the state supreme court as to the meaning of the state's constitution is rarely challenged.<sup>78</sup> But can courts exert their

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But exclusive judicial inherent power may allow another branch to exercise that power as a matter of comity. *Id.*

75. See, e.g., *Konrad v. Jefferson Parish Council*, 520 So.2d 393, 397 (La. 1988); *In re Burson*, 909 S.W.2d 768, 772-73 (Tenn. 1995); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730, 735-36 (Wash. 1981). For a discussion of Oregon case law on inherent judicial power in unauthorized practice cases, see *Robertson & Buehler, supra* note 70, at 283-85. For Oregon cases considering the inherent judicial power concept in deciding nonunauthorized practice cases, see, e.g., *Dennehy v. City of Gresham*, 841 P.2d 633, 635 (1992) (holding that the Oregon Tax Court does not have the inherent equitable power to award attorneys' fees); *State ex rel. Acocella v. Allen*, 604 P.2d 391, 394-95 (1979) (holding that the Oregon statute on appointment of the public defender did not unconstitutionally infringe on the inherent power of the judiciary to compel attorneys to represent indigent criminal defendants).

76. See, e.g., *Eckles v. Atlanta Tech. Group, Inc.*, 485 S.E.2d 22, 25 (Ga. 1997); *Reed v. Labor & Indus. Relations Comm'n*, 789 S.W.2d 19, 20 (Mo. 1990).

In our system of constitutionally allocated governmental powers, it seems illogical that courts could have power from a nonconstitutional source. One commentator, however, apparently considers that there is an alternative nonconstitutional source for inherent judicial power—that courts have such power from their existence as courts. See STUMPF, *supra* note 73, at 8-9.

77. An Oregon opinion has succinctly stated this position. See *Lyons v. Pearce*, 676 P.2d 905, 909 (1984) ("The interpretation of constitutional provisions is a judicial, not a legislative, function. The legislature cannot overrule a judicial interpretation of the constitution or amend the constitution by adopting a statute.").

78. Judicial supremacy in interpreting the Federal Constitution was an important issue with influential opponents and supporters in the early days of the republic and was seriously challenged on occasion by some presidents thereafter. On the evolution of the judicial supremacy of the United States Supreme Court as to interpretation of the Federal Constitution, see EDWARD S. CORWIN, *COURT OVER CONSTITUTION* 59-84 (1938); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (rev. ed. 1994). See also ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 14-22 (1971) (considering earlier

power only through litigated case determinations? Or can they also do so through legislative-type rules issued independently of any litigated matter? Quite universally courts, in some states only the state's highest court, have the power to adopt court rules on at least some aspects of court administration, practice and procedure.<sup>79</sup> Judicial rule-making is expressly authorized by the state constitutions in a majority of states and, in others, is an incident of other judicial

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presidential support for coordinate review—officials of each branch interpreting the Federal Constitution as they understand it—but concluding that judicial supremacy in constitutional interpretation is preferable, even though judicial interpretation of the Constitution may not always be adhered to by those in another branch).

Some contemporary commentators have proposed that serious consideration be given to substantially limiting the Supreme Court's constitutional interpretive powers. *See, e.g.*, David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 395-99 (1991) (suggesting that congressional supremacy or other constitutional interpretive regimes may be preferable to judicial supremacy); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2* (1980) (summarizing the theme of his book as follows: "[A]lthough judicial review is incompatible with a fundamental precept of American democracy—majority rule—the court must exercise this power in order to protect individual rights, which are not adequately represented in the political processes. When judicial review is unnecessary for the effective preservation of our constitutional scheme, however, the Court should decline to exercise its authority. By so abstaining, the Justices both reduce the discord between judicial review and majoritarian democracy and enhance their ability to render enforceable constitutional decisions when their participation is critically needed."); Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J. L. REFORM 51, 84-85 (1984) (suggesting that permitting congressional override of Supreme Court decisions on basic constitutional rights, analogous to the legislative override permitted by the Canadian Charter of Rights and Freedoms, might be preferable to constitutional supremacy of the Supreme Court that presently exists). For a recommendation that final authority of the Supreme Court over constitutional interpretation be totally eliminated, see THOMAS J. HIGGINS, *JUDICIAL REVIEW UNMASKED* 261-68 (1981).

79. On courts' rule-making power, see A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Robert J. Lynn, *Judicial Rule-Making and the Separation of Powers in New Hampshire: The Need for Constitutional Reform*, N.H. B.J. 44 (March 2001); DONNA J. PUGH ET AL., *JUDICIAL RULEMAKING, A COMPENDIUM* (1984); STUMPF, *supra* note 73, at 17-20; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 999 (1989). On preferred forms of judicial rule-making, see 1 ABA, *STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION* § 1.30 (1990); JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977).

Some judicial court rules are very long and detailed—for example, the rules prescribing professional responsibility standards for lawyers. In nearly all states these professional responsibility rules, usually with some changes, are either the ABA Model Rules of Professional Conduct or the ABA Model Code of Professional Responsibility. California has never adopted the ABA Model Rules or Model Code but has borrowed from both in its Rules of Professional Conduct.



constitutional powers.<sup>80</sup> The legislative-type rule-making power of state courts is separate and distinct from the courts' power to declare authoritative rules as binding legal principles when deciding cases in litigation before them.<sup>81</sup> Unauthorized law practice is one of the many matters expressly dealt with by court rules in a number of states.<sup>82</sup>

Although state courts obviously have the power to determine what is and is not the unauthorized practice of law, to what extent do they share this power with the other two branches of government? There are several possible answers to this question with authoritative support in prevailing law in at least some states. One is that the courts' power over unauthorized practice of law matters is exclusive. Only the courts have law-making power in this field of law. This position has been adopted in a few states.<sup>83</sup> Another, the

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80. On the source of judicial rule-making power in each state, see Lynn, *supra* note 79, at 49-50.

81. The states vary as to the extent of the courts' legislative-type rule-making power and on what matters this rule-making power is exclusive or shared with the other branches of government. For variations among the states on the extent of state courts' rule-making authority, see Lynn, *supra* note 79, at 49-50; PUGH, *supra* note 79 (containing a state-by-state summary of state court rule-making law).

82. State courts have dealt with many aspects of unauthorized practice in court rules. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002) (prohibiting lawyers from engaging in certain practices that constitute the unauthorized practice of law and from assisting others in engaging in the unauthorized practice of law). This Model Rule, except for a recent revision that liberalizes permissible multijurisdictional law practice, has been adopted as a rule of court in most states, and adoption of the revision by many states is expected soon. See also MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (2002) (in effect in Oregon as OR. R. PR. DR 3-101). Among other examples of state court rules of relevance to unauthorized law practice are those permitting legal services to be provided by the following providers (legal services that if not authorized would be unauthorized practice): foreign lawyers, see, e.g., CONN. SUP. CT. R. §§ 2-17-2-21; out-of-state lawyers in litigated matters before the courts if admitted pro hac vice, e.g., *id.* § 2-16; nonlawyer closing officers in real estate transactions, WASH. CT. R. 12 (Admission to Practice). A few state courts by court rule have defined the practice of law for unauthorized practice purposes. See, e.g., *id.* R. 24 (defining the practice of law and listing some exceptions to what otherwise would be the unauthorized practice of law) (for this Washington Rule see *supra* note 30.).

A court, of course, may prefer to act by adjudicated decision rather than court rule. An example of this is the refusal by the Supreme Court of South Carolina in *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123 (S.C. 1992). In its rejection of the rules proposed by a special subcommittee of the South Carolina Bar, the court said: "We are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." *Id.* at 124.

83. See, e.g., *In re Creasy*, 12 P.3d 214, 216 (Ariz. 2000); *May v. Coleman*, 945 S.W.2d 426, 428 (Ky. 1997); *In re Opinion No. 26*, 654 A.2d 1344, 1345 (N.J. 1995) (But

majority position, is that the power is concurrent, shared by all three governmental branches, but that the courts have ultimate power. The courts' determinations prevail if their position differs from that of one of the other branches.<sup>84</sup> A third position, and one that also has authoritative support in a few states, is that power over unauthorized practice of law matters is concurrent but that the courts' power is subordinate to that of either of the other two branches when their positions differ.<sup>85</sup> However, the position of some states on the

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the legislature may criminalize certain conduct that constitutes the unauthorized practice of law. *Id.* at 1354.).

84. *See, e.g.*, *Eckles v. Atlanta Tech. Group*, 485 S.E.2d 22, 25-26 (Ga. 1997); *Reed v. Labor & Indus. Relations Comm'n*, 789 S.W.2d 19, 20 (Mo. 1990); *Unauthorized Practice of Law Rules*, 422 S.E.2d at 124; *In re Burson*, 909 S.W.2d 768, 773-74 (Tenn. 1995).

Professor Wolfram refers to the superior power of the courts over the practice of law, including unauthorized law practice, as a negative inherent power because, under this power, the courts can invalidate any and all statutes or administrative agency regulations permitting or restricting the practice of law and can do so irrespective of the merits of the statutes or regulations. He considers judicial resort to inherent judicial power in invalidating laws adopted by the other branches to be undesirable in most instances. On Wolfram's analysis and evaluation of negative inherent power, see WOLFRAM, *supra* note 1, at 834-35; Wolfram, *Lawyer Turf*, *supra* note 73.

85. Case law authority is very skimpy on the proposition that state courts have concurrent authority on unauthorized law practice with one or the other branches but that ultimate authority is in one of the other branches. For cases that consider the courts' power to be subordinate, see, e.g., *Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980) ("The legislature has constitutional authorization to oust the Court's responsibility to protect the public in administrative proceedings under article V, section 1 of the Florida Constitution, and when it does so any 'practice of law' conduct becomes, in effect, authorized representation."). But in *Moses* the relevant statute was construed, under the facts of the case, as not ousting the court's authority. *Id.* at 418. Since this case, the courts' authority in Florida over unauthorized law practice has apparently not been seriously challenged in any litigated case. *See also* *State Bar v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976) (holding that the legislature has ultimate authority to determine what is the unauthorized practice of law, although because the legislature has not done so, determination is left to the judiciary); *State Bar of Mich. v. Galloway*, 335 N.W.2d 475, 479-80 (Mich. App. 1983) (holding that ultimate authority is in the legislature as to whether nonlawyers may represent parties before an administrative agency); *Ranta v. McCarney*, 391 N.W.2d 161, 165 (N.D. 1986) (relying on state constitutional language that the courts have authority over law practice "unless otherwise provided by law"). But the state legislature has by statute vested the North Dakota Supreme Court with the power to make "all necessary rules for the restraint of persons unlawfully engaging in the practice of the law in this state." N.D. CENT. CODE § 27-02-07 (1991).

New York probably should be classified as a concurrent but legislative-dominant power state on judicial power over unauthorized law practice as its courts long have accepted and applied statutes controlling law practice, including unauthorized practice, without challenging the legislature's authority to enact these statutes. *See, e.g.*, *People v. Alfani*, 125 N.E. 671, 672-74 (N.Y. 1919); *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 989-90 (App. Div. 1967), *rev'd on other grounds*, 234 N.E.2d 459 (N.Y. 1967); *People v. Jakubowitz*, 710 N.Y.S.2d 844, 845 (Sup. Ct. 2000).

power allocation issue is unclear, either because there are no reported opinions on the matter<sup>86</sup> or because reported opinions on the issue are vague or inconclusive.<sup>87</sup> In justifying their declared posi-

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There also is some recent indication by the California Supreme Court that California follows the legislative dominance position as to what constitutes the practice of law. See *Birbrower, Montalbano, Condon, & Frank v. ESQ Bus. Serv.*, 949 P.2d 1, 9 (Cal. 1998). But cf. *Merco Constr. Eng'rs v. Mun. Court*, 581 P.2d 636, 640-41 (Cal. 1978).

86. For example, South Dakota and Wyoming. And compare *Utah State Bar v. Summerhayes & Hayden*, 905 P.2d 867, 871 n.1 (Utah 1995), in which the issue was brought before the court but the court refused to address it.

87. For example, Texas. See *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47, 50-51 (Tex. 1985); *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41 (Tex. App. 1987); *Grievance Comm. v. Dean*, 190 S.W.2d 126, 129 (Tex. Civ. App. 1945).

There are no Oregon judicial opinions in unauthorized practice of law cases that clearly set forth the scope of judicial power over the unauthorized practice of law relative to the other two governmental branches. However, there is comprehensive enough language in Oregon judicial opinions on some other matters indicating that the Oregon judicial power position on unauthorized practice of law may be as follows: concurrent power in both the courts and the legislature but ultimate power is in the legislature unless a legislative enactment unreasonably encroaches on judicial functions. See, e.g., *State ex rel. Acocella v. Allen*, 604 P.2d 391, 395 (Or. 1979) (overruling the trial court's refusal to appoint counsel other than the public defender to represent indigent defendants in a criminal case despite a statute authorizing such an appointment, a statute that the trial judge asserts is unconstitutional). In support of its decision, the Oregon Supreme Court opinion states, after citing earlier Oregon cases:

These cases establish that the legislature may regulate the legal profession and the practice of law, provided that a statute does not unduly burden or unduly interfere with the judiciary in the exercise of its judicial functions. Viewing ORS 151.280(7) against that standard, we do not see how the occasional unavailability of the State Public Defender to represent indigent defendants on appeal would impair the court's ability to carry out any judicial function.

*Id.* The *Acocella* opinion, of course, adds further uncertainties: what are judicial functions, and what will impair the courts' ability to carry out such functions?

On the uncertainty in Oregon case law regarding the scope of judicial power over the unauthorized practice of law, also see the following unauthorized practice opinions in which the Oregon Supreme Court refused to answer the question of whether the legislature has the exclusive constitutional power to define the practice of law, even though this can be important in determining whether unauthorized practice of law has occurred: *Oregon State Bar v. Wright*, 573 P.2d 283, 290 (Or. 1977) (stating that there is no need in this case to decide the issue, as the defendant admitted to engaging in conduct constituting the practice of law); and *Oregon State Bar v. Security Escrows, Inc.*, 377 P.2d 334, 336 (Or. 1962). The court admitted that whether either the court or the legislature has the exclusive power to decide the issue is a question "of constitutional importance, involving as it does, the frontier between the separated powers of government under our state constitution." *Id.* One reason the court gave for not answering the question is that the question had not been briefed and argued with the thoroughness it deserves. *Id.*

tion on court power over unauthorized law practice matters, whatever that position is, state courts typically have relied on brief references to state constitutional texts as to judicial authority<sup>88</sup> or have referred in general terms to their inherent powers.<sup>89</sup> They rarely, if ever, have asserted policy arguments to further justify whatever power position they adopt.

### III. JUSTIFYING POSITIONS TAKEN ON THE SCOPE OF STATE COURT LEGAL POWER OVER UNAUTHORIZED LAW PRACTICE: DIVERSITY IN STATE CONSTITUTIONAL INTERPRETATION

As the previous section shows, there are substantial differences among the states as to the scope of judicial power, including the scope of that power over the unauthorized practice of law. The primary source of judicial power in each state is the state constitution. But the constitutional text on judicial power in nearly every state constitution is phrased in such vague and general terms as to require extensive interpretation to make it meaningful in application—interpretation that leaves most interpreters with considerable discretion in determining what the constitution provides.<sup>90</sup> Legal problem solving usually involves selection from among alternative possible solutions; but, given the ambiguity of most constitutional texts and the diversity and complexity of matters to which constitutional texts may apply, legal problem solving that requires constitutional interpretation can be an exceptionally difficult and challenging task. Courts and commentators, when interpreting constitutions,

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On the frequent unwillingness of state supreme courts to provide adequate or meaningful analysis of state supreme court principles, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 781-84 (1992).

88. See, e.g., *In re Creasy*, 12 P.3d 214, 216 (Ariz. 2000); *In re Opinion No. 26*, 654 A.2d 1344, 1345 (N.J. 1995).

89. See, e.g., *Eckles v. Atlanta Tech. Group*, 485 S.E.2d 22, 25 (Ga. 1997); *In re Burson*, 909 S.W.2d 768, 773-74 (Tenn. 1995).

90. The need for interpretive discretion on the scope of judicial power is considerably reduced in a few state constitutions due to more specific textual language on judicial power in these constitutions. See, e.g., KY. CONST. § 116 (the Kentucky Supreme Court "shall, by rule, govern admission to the bar."). However, interpretation was required as to whether this language extended to unauthorized practice of law. In *May v. Coleman*, 945 S.W.2d 426, 428 (Ky. 1997), it was held that section 116 gives the Kentucky Supreme Court sole authority to designate who is authorized to practice law. See also ARIZ. CONST. art. 26, § 1 (preempting judicial power in one important aspect of unauthorized practice by expressly permitting licensed real estate brokers to draft or fill out and complete certain legal documents in land transactions).

usually advance supportive reasons for their interpretive conclusions.<sup>91</sup> But commentators, especially academic commentators, in justifying their interpretive conclusions, commonly present a greater range of supportive reasons than do others. Commentators occasionally have also recommended state constitutional amendments, including amendments concerning the allocation of judicial power;<sup>92</sup> but usually they consider existing constitutional texts, if properly interpreted, sufficient to permit solutions that the commentators consider necessary.

Although there often are sharp differences among those interpreting a state constitution as to the constitution's meaning, many interpreters generally adhere to the same general procedure in their interpretive efforts, whether the scope of judicial power over unauthorized practice or any other constitutional problem is being considered. The procedure consists of three possible steps commonly taken in sequence, although some interpreters consider them concurrently. Step one is to concentrate on the constitutional text. If the interpreter believes the text is sufficiently clear and unequivocal in providing an answer to the question at hand, the text is often relied on without the necessity of moving to the next step. If the text does not adequately answer the question, the interpreter moves to step two. Step two considers the intent of the persons who drafted or adopted the constitution as to what the constitutional text means. This intent may be ascertained from different sources, including statements by the drafters or adopters as to what they intended or from the usual meaning of key constitutional terms at the time the constitution was adopted. If a sequential approach is taken, step three is resorted to if the first two steps do not provide a sufficiently satisfactory and convincing answer to the constitution's meaning.<sup>93</sup>

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91. "Commentators," as the term is used here, includes judges when they are not acting ex officio in making interpretive observations. Among other commentators are academic scholars, both lawyers and nonlawyers; practicing lawyers when representing clients; and representatives of other interest groups when commenting on constitutional meaning.

92. For state constitution amendment proposals by commentators, see, e.g., Levin & Amsterdam, *supra* note 79, at 42; Lynn, *supra* note 79, at 58-61.

93. On the unavoidable necessity of step three in interpreting the Federal Constitution, see Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987).

Given the generally broad language of the [Federal] Constitution's text, a reviewing court has substantial power to incorporate into the interpretive process many normative judgments concerning social policy and political theory. Such a result is simply unavoidable, once we recognize both that the provisions of a written

Under step three, the interpreter determines what the relevant constitutional language or concept under consideration means based on one or more underlying policies that the interpreter concludes the constitution should be furthering.<sup>94</sup> A policy, as the term is used here, is a course of action to achieve one or more important social goals or values. Some goals or values may be very vague. For example, justice, social equality, or avoiding tyranny may be too vague on their own to be sufficient guides to constitutional meaning. Policies can be very helpful guides to constitutional interpretation, but many are so broad and general that when being considered as aids to constitutional interpretation, considerable discretion may still remain in the interpreter as to whether and how the policies apply to any particular constitutional problem being considered. A policy may eventually become a rule of law but more often is a reason advanced to help justify a rule of law or interpretation of a rule of law.

A variety of policies have been advanced by interpreters of state constitutional provisions allocating judicial power. Some of these interpretive efforts are focused on judicial power over unauthorized practice of law. Some are focused on judicial power over other matters, matters often with enough similarity to unauthorized practice of law that the policies advocated may be applicable as well to judicial power over unauthorized practice of law. State court

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constitution must be broadly phrased to allow for unforeseen developments and situations, and that the only governmental body truly suited to the exercise of the interpretive power is the largely independent judicial branch. Unless the very existence of a written constitution is to be rendered totally meaningless, however, the language of its provisions must be assumed to retain at least some degree of ascertainable meaning.

*Id.* at 51.

94. Some multi-step interpreters omit policy considerations. *See, e.g.*, *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992). Interpreting the bail rights section of the Oregon Constitution, the court sets forth this three-step interpretive procedure: "There are three levels on which that constitutional provision [art. I, § 14] must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Id.*

For an analysis of *Priest* and other Oregon cases on constitutional interpretation that is critical of the Oregon courts for failure to follow a consistent pattern or overriding theory in constitutional interpretation, see Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000). And compare Landau's analysis of the Oregon Supreme Court's statutory interpretation methodology in Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1 (1996). Jack Landau is an Oregon Court of Appeals judge. On *Priest*, see also Christopher A. Bishop, Comment, *Revisiting Article I, Section 5 of the Oregon Constitution: The Application of Priest v. Pearce and an Evaluation of the Oregon School Tax Credit*, 38 WILLAMETTE L. REV. 427 (2002).

judges seldom invoke policy arguments in their judicial opinions when deciding cases brought before them that raise issues of constitutional allocation of judicial power. On constitutional judicial power issues, they usually make their decisions at the first step in the interpretive procedural process, seldom at the second or third. In determining the scope of their judicial power and whether their power is superior to that of the other two governmental branches, state courts frequently rely on the inherent power concept.<sup>95</sup> But this is a step-one interpretive approach. The courts are interpreting the constitutions' texts on separation of powers or other allocations of judicial functions to include inherent power as an essential element of the textual concept.<sup>96</sup> Commentators, much more commonly than courts, resort to step three policy arguments in support of their analyses of how state constitutions allocate judicial power.

There are many different and often inconsistent policies that can be advanced in aid of constitutional interpretations of power allocations among the three branches of government. Some of the policies are generally favorable to greater judicial power, some to lesser judicial power, and as to others, it depends on how the policy is defined or how it should best be implemented in a particular situation. The range and variety of policies are shown by the following sample of possible policies. The relevance of each policy to the allocation of judicial power over the unauthorized practice of law is considered after the policy is set forth.<sup>97</sup>

\* *Assure each branch sufficient power over its essential func-*

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95. See *supra* note 75 and accompanying text.

96. See *supra* notes 73-75 and accompanying text.

97. The listing in the text is merely a sampling. Many other policies are possible as aids to constitutional interpretations. Further examples are these and are added indications of the broad range of policy possibilities: prefer contemporary moral values; avoid judicial activism; fairly balance competing public and private interests; prefer a constitutional interpretation consistent with that adopted in a nearby state if this will benefit the interstate activities of citizens in your state; and avoid making constitutional decisions if the problems can be resolved legally on nonconstitutional grounds.

The literature on constitutional interpretation is extensive, much of it advocating a particular approach or policy choice and most of it concentrating on the Federal Constitution. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW, THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* (2d ed. 1995); ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW* (1997); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS*, ch. 6 (1998); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION, THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990); Gardner, *supra* note 87.

tions to enable it to perform successfully its primary purpose.<sup>98</sup>

Whether this policy helps justify greater judicial power over unauthorized practice of law than what is constitutionally allotted to either of the other governmental branches depends on how broad a meaning the interpreter gives to the concepts of essential court functions and primary court purpose. At best, dominant judicial power over unauthorized practice of law would seem to be at the outer limits of what these concepts authorize. Dominant judicial power over the unauthorized practice of law is more obviously justified if limited to determining who may represent parties in matters before the courts, as such representation directly relates to the essential court

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98. This policy, although phrased in different ways, has often been adopted by both courts and commentators. See, e.g., *Ramstead v. Morgan*, 347 P.2d 594, 601 (Or. 1959) ("Unquestionably, the legislature may act authoritatively with respect to some matters which affect the judicial process. . . . The limits of legislative authority are reached, however, when legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions."); *Rooney v. Kulongoski*, 902 P.2d 1143, 1151 (Or. 1995) (citing *Ramstead v. Morgan*, 347 P.2d 594 (Or. 1959), with approval and adding: "That inquiry [whether one department has unduly burdened another department] corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments."); *Anderson County Quarterly Court v. Judges of the 28th Judicial Cir.*, 579 S.W.2d 875, 881 (Tenn. Ct. App. 1978) (The courts "must have and do have the inherent powers necessary to insure the adequate fulfillment of their judicial functions."); *In re Salary of the Judicial Director*, 552 P.2d 163, 173 (Wash. 1976) (holding judicial power to secure judicial funding has been held permissible "if the funds sought to be controlled are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of its [the court's] constitutional duties"; the required necessity held not proven in that case); Stephen E. Kalish, *The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys*, 59 NEB. L. REV. 555, 599 (1980) (holding that the legislature should have ultimate control except when it is "strictly necessary to assure the proper functioning of the judicial process"); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988) (describing as follows the functionalist approach favored by many commentators in interpreting the federal Constitution: The functionalists "generally ask whether the exercise of the contested function by one branch impermissibly intrudes into the core function or domain of the other branch. In other words, as long as the power assumed by one branch does not threaten to disturb the basic allocation of powers intended by the framers, the action should be sustained.").

Charles Wolfram has also expressed support for the functionalist policy approach to state court judicial power under some circumstances, including legislative enactments setting a low statutory cap on fees the state will pay a lawyer who represents an indigent defendant in a death-penalty case. See Wolfram, *Lawyer Turf*, *supra* note 73, at 10 ("At some point a court is warranted in saying that the degree of impairment [of adequate representation] has reached the point of unconstitutional encroachment on the essential functioning of a court. At that point the legislative act is unconstitutional."). Wolfram does not believe, however, that this ultimate judicial power over the legislature should be extended to the unauthorized practice of law. See WOLFRAM, *supra* note 1, at 27-31.



function of hearing and deciding litigated matters brought before the courts.

*\* Avoid power allocation to any one branch that would result in that branch being overly dominant relative to the other two branches.*<sup>99</sup>

This is a policy that, in the abstract, has merit; but as an aid to how power over unauthorized practice of law should be allocated among the three governmental branches, it provides little help. The overall power balance among the three branches is little affected by which branch has ultimate or even exclusive power over unauthorized practice of law; so, the policy is largely irrelevant to this power allocation issue. The avoiding-power-imbalance admonition of the policy may, however, be relevant to power allocation of unauthorized practice of law if it is perceived that there is a trend underway of courts acquiring excessive power and that restricting judicial power over unauthorized practice of law would help reverse this trend.

*\* Prefer the branch most subject to control by the citizenry and most accountable to the citizenry.*<sup>100</sup>

This policy, if followed, generally disfavors the courts when they disagree with either of the other two branches on an unauthor-

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99. LEARNED HAND, *THE SPIRIT OF LIBERTY* 159 (2d ed. 1953) ("A constitution is primarily an instrument to distribute political power; and so far as it is, it is hard to escape the necessity of some tribunal with authority to declare when the prescribed distribution has been disturbed. Otherwise those who hold the purse will be likely in the end to dominate and absorb everything else, except as astute executives may from time to time check them by capturing and holding popular favor.").

100. In discussing control of law practice, Wolfram has stated that separation of powers "is a doctrine that should give primacy to the most truly democratic organ of government: the legislature." See Wolfram, *Lawyer Turf*, *supra* note 73, at 14. But he recognizes that separation of powers is not a doctrine about "air-tight" separation. "It is a doctrine, more or less, of balance and accommodation." *Id.*

Even some judges have expressed concern over the lack of judicial accountability. See, for example, a New Hampshire judge's observations, Lynn, *supra* note 79, at 61 (expressing concern over the lack of judicial accountability in judicial rule-making, and concluding that "in a free and democratic society the ultimate responsibility for law-making—whether the laws be substantive, procedural, evidentiary, or whatever—must rest with the legislature"). Also see comments by a federal judge as to court rule-making power, WEINSTEIN, *supra* note 79, at 78 ("So long as the legislature is not seeking to destroy a court's power to act effectively, statutes should supersede [court] rules. Unlike the courts, the executive and legislature are subject to popular will; this will, however blurred by the filter of representative democracy, should not be circumscribed unnecessarily. The Anglo-American experience with rule-making demonstrates no need for the court to have unfettered control over procedure through rule-making.").

ized practice matter or any other matter. Influence of the citizenry on the courts is especially weak in those states whose judges are not elected or are elected for exceptionally long terms compared to the terms of legislators or top executive officials. However, justification for political influence on the courts by the citizenry is substantially limited by the widely approved and adhered-to principle of judicial independence—a type of restriction not applicable to the other two branches. A serious problem with the control-by-the-citizenry policy is that, if not cautiously and restrictively applied, it so weakens the courts as to destroy the concept of co-equal branches of government—a basic feature of American constitutional law. It can also lead to undue influence of business and other special interest groups on judicial selection and retention, with consequent undue influence on judicial decision making. This can result, for example, from special interest group contributions to judges' election campaigns and to funding of issue advertising at campaign time directed at particular judicial candidates. These are increasingly prevalent and troublesome influences on the makeup and ultimately the decisions of many state courts.<sup>101</sup> A significant variant of the above pro-citizenry policy, one that legislators and government executive officials are prone to follow, is to prefer whatever interpretive decision the electorate already has given some indication should be preferred in resolving the particular problem under consideration. Even courts on occasion may be sensitive to views of the electorate, as is implied by the oft-repeated observation that the United States Supreme Court follows the election returns. But how power over unauthorized practice of law should be allocated among governmental branches seldom can be shown to have been a concern of the electorate in any election, federal or state.

\* *Prefer the branch with the greatest law-making competence on the matter under consideration.*<sup>102</sup>

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101. On these influences, see, e.g., Symposium, *Judicial Election Campaigns*, 41 JUDGES' J. 5 (Sum. 2002); Symposium, *National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001); Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973 (2001); David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361 (2001); Paul J. DeMuniz, *infra* note 104.

102. See ARTHUR T. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 107 (1953) ("The modern trend throughout the country has been to give the courts the power to regulate their own procedure and administration and then to hold them responsible for results. The reasons for this trend are obvious. Rules

Ultimate power in the courts over unauthorized practice of law is favored by this approach, as judges (from their experience on the bench) and as lawyers (before becoming judges) have a better understanding than most legislators and government executives of the essential skills and ethical commitments needed to properly practice law and of the adverse consequences that can result from the unauthorized practice of law.

*\* If there are justifiable reasons for doing so, adopt an interpretation other than the one the interpreter personally prefers.*

Interpreters of state constitutions quite often adopt interpretations other than what the interpreter personally considers preferable. This can occur whether the interpretive question relates to judicial power over unauthorized practice of law or to any other constitutional interpretive question. The preferred interpretation, however meritorious, is passed over in favor of one more consistent with the interpreter's role or that will be instrumental in achieving other high-priority objectives of the interpreter. Lawyers representing private clients and lawyers and other officials representing government agencies almost always adopt interpretations they consider most likely to further the interests of the clients or government agencies they represent. These interpretations are adopted even though the interpreters personally prefer some other interpretation. The role of advocates usually requires that they subordinate personal views that are inconsistent with their principals' interests. A judge, however, when interpreting ambiguous provisions of a state constitution, is usually expected to adopt the interpretation that the judge personally believes is the preferable one. But there are recognized exceptions to this that may be considered justifiable. The judge may conclude that the personally preferred interpretation may have such undesirable consequences that it should not be adopted. The interpretation, for example, may cause serious interbranch conflict that

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of court are made by experts who are familiar with the specific problems to be solved and the various ways of solving them.").

Deborah Rhode, in her numerous publications on unauthorized practice of law, has had surprisingly little to say about how power over that phase of the practice should be allocated among the three governmental branches. She has, however, indicated her opposition to granting such power to the courts. *See Rhode, supra* note 54, at 233 ("Since judges generally lack the time, expertise, and objectivity to provide appropriate oversight of lay practitioners, little would be gained by placing their regulation under nominal court supervision.").

should be avoided,<sup>103</sup> be unenforceable, be inconsistent with prevailing legal authority, or be certain to be reversed by a higher court. Also, there may be justifiable tactical policies for subordinating a judge's personal preference. When an interpretive decision is before a multi-judge court, one or more of the judges may compromise on an interpretive decision in the hope that this will help them prevail on other contested issues. In addition, subordinating a preference may be essential to giving the impression of a unified court when a split decision would threaten the court's reputation or influence. Accountability to the electorate can create still another possible exception to the expectation that a state court judge will adhere to personal interpretive preference. If the judge is up for re-election and intends to run again, it may be considered quite justifiable for the judge to accede to the views of the electorate in making a constitutional interpretation, irrespective of the judge's personal interpretive preferences.<sup>104</sup>

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103. But there have been occasions when courts concluded that such an important principle was at stake that they were willing to make a constitutional interpretive decision in defiance of another governmental branch, knowing that this would result in a protracted and controversial showdown with the other branch. These confrontations usually have involved failure by the legislature to provide what the courts considered adequate funding for essential court operations or for legal representation of indigents charged with crimes. *See, e.g.*, *State ex rel. Stephan v. Smith & Fromme*, 747 P.2d 816, 821-23 (Kan. 1987) (commenting on state court controversy with the state legislative and executive branches over funding of court-appointed counsel to represent indigents charged with crimes); Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Powers*, 78 JUDICATURE 12 (July-Aug. 1994) (discussing a conflict between the Chief Judge of the New York Court of Appeals and the Governor over state court funding); Comment, *Constitutional Crisis in Pennsylvania: Pennsylvania Supreme Court v. Pennsylvania General Assembly*, 102 DICK. L. REV. 201 (1997) (discussing controversy between the court and legislature over judicial funding).

104. Justice DeMuniz of the Oregon Supreme Court recently has cautioned, however, that the valued principle of judicial independence is threatened if judges compromise their fidelity to the rule of law and accede to partisan political pressures, pressures that are often prevalent at election time in states where judges are elected by popular vote. *See* Paul J. DeMuniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002).

Judges certainly must be accountable to the citizens, both professionally and in their personal lives. Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions.

*Id.*

Academic commentators are different from the other kinds of interpreters. When interpreting state constitutional provisions, academic commentators are rarely, if ever, faced with the same inhibiting factors that may cause other interpreters to adopt interpretations inconsistent with their personal preferences. Academic commentators are not representing clients or government employers and are free of the tactical and accountability influences that judges may face. Their job is careful and critical analysis that results in adopting an interpretation that they personally prefer. The suspicion sometimes arises that some academic commentators adopt interpretations that are so extreme, even ridiculous, that the interpreters are trying to attract attention, to make an academic splash, and that it cannot really be believed that this is their personal preference. Fortunately, such cases are rare.

It is obvious that each step in the interpretive process usually requires the exercise of considerable discretion on the part of the interpreter. Relevant textual language is almost always somewhat ambiguous and the interpreter must decide when and if the text is sufficiently clear to be binding without considering the next step. Resort to the intent of the drafters and adopters of the constitution usually also leaves a wide range of choice in the interpreter, including which drafter's or adopter's views should be considered, the meaning of the statements attributed to them, and when are the views of the drafters or adopters sufficiently unconvincing that the interpreter should move on to step three. The drafters and adopters of the Federal Constitution, usually referred to as the Framers, often are given almost religious reverence by interpreters and their views are commonly given exhaustive attention in determining the meaning of the Federal Constitution. The drafters and adopters of state constitutions rarely are given the same consideration and respect when state constitutions are being interpreted. The third step in the interpretive process also requires a great deal of discretionary choice by the interpreter—choice as to which of the many possible policies to rely on and, when that choice is made, often determining how to define or shape the policy or policies chosen to best resolve the interpretive problem being considered.

In making interpretive decisions on constitutional issues, interpreters frequently consider the opinions of others who have previously dealt with the same or a similar interpretive problem. These almost invariably include any relevant prior judicial opinions. The opinions of commentators also may be considered; and scholars, in

making constitutional interpretations, almost always consider the opinions of other commentators, especially other scholars. In reaching interpretive decisions, courts also are aided by briefs and arguments of counsel and by amicus briefs in some cases. Also, a judge sitting on a multi-judge panel when deciding a case is frequently influenced and sometimes persuaded by the views of fellow judges on the same decision-making panel.<sup>105</sup> However, both courts and counsel in litigated matters involving constitutional meaning commonly limit their exercise of interpretive discretion to little more than selection from among prior judicial decisions considering the same or similar interpretive problems.

The above discussion raises some intriguing questions. When state constitutional text provisions are ambiguous as to what power the state's courts have over unauthorized practice of law, and such ambiguity is very pervasive, why are some constitutional interpretations of judicial power adopted by the courts in some states but not by the courts in other states? And why have the courts in a substantial minority of states not decided whether their judicial power over unauthorized practice of law issues is superior or subordinate to that of other governmental branches? Answering these questions is beyond the intended coverage of this Article, but the questions deserve more attention than constitutional law scholars have given them. Many causative factors that vary among the states are possible reasons for the interpretive differences among state courts on their constitutional power over unauthorized practice of law. Variables that may be relevant are these: the particular textual language on separation of powers, if any, in each state's constitution; the prevalence of the unauthorized practice of law in each state; the prevalence and intensity of opposition to unauthorized practice of law within each state; the influence of the organized bar on the state's judges; the vulnerability of each state's courts to pressures from the other branches of state government and from the electorate; the extent to which relations of each state's courts with the other branches of government have been cooperative and noncontentious; and the potential for amendment of each state's constitution on any aspect of

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105. Judge Edwards of the United States Court of Appeals for the D.C. Circuit refers to this process of influence and possible persuasion as judicial collegiality when engaged in seriously, attentively and respectfully by the judges. He obviously believes that all appellate courts should strive to achieve this kind of collegiality in their decision making. On Edwards' perception of judicial collegiality, see Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998).

unauthorized practice of law. Acquiring reliable answers to the above-mentioned constitutional questions will require careful study, including some difficult-to-implement empirical studies. Complicating any such study is the fact that, historically, many of the causative factors in each state have fluctuated.

#### IV. FUTURE DEVELOPMENTS IN THE LEGAL REGULATION OF UNAUTHORIZED LAW PRACTICE AND THE ROLE OF STATE COURTS IN THAT REGULATION

The trend of nonlawyers being increasingly active as providers of legal services seems certain to continue. Continued expansion in the variety and volume of legal service activities by lawyers in jurisdictions where the lawyers are not admitted to practice also seems certain. The market for legal services is so big, so profitable, and legal restrictions on unauthorized law practice so seldom enforced that participation in that market is attractive to many legal service providers despite the apparent illegality of their legal services work. There has been, of course, renewed interest recently in both enforcing and reforming unauthorized practice laws. But the resulting efforts have been so narrowly and selectively focused and have generated such limited support and success as to have had little effect overall in reducing the volume of law practice that is legally unauthorized. Eventually, however, possibly in the next decade, much more comprehensive and intensive change efforts seem inevitable. The continued violations of laws as important as those regulating who may provide legal services, and the ambiguity in important aspects of those laws, cannot continue indefinitely without far more extensive law enforcement or law reform efforts. The bar or a large segment of the bar may become concerned enough over the growing legal services activities of its competitors that they will make the financial and political investment needed in an all-out battle with competitors. If the bar does not initiate a major move against its competitors, one or more of the big nonlawyer occupations active in providing legal services may attempt to change the basic legal underpinnings of unauthorized practice law. They may believe this is necessary if they are to expand their legal service activities even more extensively. Additionally, they may conclude that the time has arrived for them to seek legal validation of their established position in the legal services market; that they are so entrenched in that market that government law-making bodies are now certain to support

changes in the law that will fully and clearly approve their current legal services activities. What precise event or events will trigger these major efforts to attain comprehensive change in the enforcement or reform of unauthorized practice laws are not predictable this far in advance but sooner or later will occur.

Any consideration of prospects for future change in the law of unauthorized law practice, either in restrictions that the law imposes or in its enforcement, should be fully cognizant of the crucial role of state courts. In a majority of states, state courts have the ultimate and superior constitutional power to make unauthorized practice law, to determine who may or may not legally provide legal services. If the legislature or executive officials disagree with the courts' determinations, the courts' positions legally prevail. In addition, in all states, the most conclusive and decisive step in enforcing unauthorized practice laws is litigation before the state's courts. This is a process, once started, that the courts control and that results not only in legally resolving the rights of the parties before the courts but also often in authoritatively amplifying or clarifying the law's meaning.

In most states, the courts have superior and dominant power over the other two branches on unauthorized law practice matters; and there are other states, those in which this power issue is undecided, that later may join the majority. As it seems quite possible that in many situations state courts will take a more expansive view of what constitutes unauthorized practice than will the other two branches, the majority position on judicial power over unauthorized practice is generally unfavorable to those interest groups whose present or planned legal service activities violate unauthorized practice laws. Some interest groups and some commentators look with disfavor on the majority position because it allocates ultimate power to the governmental branch least accountable to the citizenry.<sup>106</sup> But is it possible, in a democratic governmental system such as the one that prevails in the United States, to legally block state courts from acquiring or exercising such superior and dominant power over unauthorized law practice? The answer, of course, is that it is possible. However, none of the possibilities for doing so holds much promise of being adopted. One possibility is to amend the state's constitution so that it clearly and precisely removes that power and, on unauthor-

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106. See, e.g., *supra* note 100; Rhode, *supra* note 54.



ized practice matters, makes state court power subordinate to the power of one or both of the other governmental branches. Even though state constitutions are easier to amend than the Federal Constitution, state constitutional amendment can be a long and arduous process, usually with little chance of success, especially when it pertains to an issue of such limited popular understanding or interest as judicial power over unauthorized law practice. Another possibility is expanded federal government takeover of unauthorized law practice regulation, relying, for example, on the Commerce Clause to justify this takeover. The federal government long has exerted limited control over who may or may not practice law, and far more extensive federal control presumably could be justified under the preemptive authority of the Federal Constitution. However, it could be very difficult to attract the requisite political support for such a radical extension of federal power.

A further possible means of achieving legal subordination of state court power over unauthorized law practice to that of the other governmental branches is for state courts to clearly and unequivocally interpret their state's constitution as so requiring. In most states this would necessitate a sharp reversal of the courts' current position, as the prevailing position is that the courts, under the state's constitution, have dominant power over unauthorized practice matters. Moreover, the courts in these states have shown little or no inclination to give up this dominant power. As for states that have not yet clearly declared whether or not their courts' power over unauthorized law practice is dominant, there may be some prospect of prevailing on them to take a subordinate rather than dominant judicial power interpretative stance. However, arguments in favor of judicial dominance over unauthorized law practice are so appealing to judges that the odds are that, when pressed to make an unequivocal decision, these courts will go with the majority of state courts and hold that judicial power over unauthorized law practice is dominant under their state's constitution. State court dominance over unauthorized law practice probably will continue in most states for the indefinite future, and it is quite likely that additional states will join the majority.

## V. CONCLUSIONS

The market for legal services in every state is substantially influenced by the scope of laws on unauthorized law practice and how

vigorously those laws are enforced. Most affected are consumers of legal services and the various professions and occupations that currently provide legal services or that have aspirations for becoming legal service providers. Lawyers admitted to practice in any particular state are the principal beneficiaries of unauthorized practice restrictions because these lawyers, in effect, have been given a monopoly as legal service providers, albeit a monopoly that in all states has many legal exceptions and is further limited by weak law enforcement efforts. There are a dozen or more other businesses and occupations that legally or illegally are active in providing legal services or whose activities in that market are of questionable legality. A substantial number of lawyers also are active in the legal services market even though the services they provide clearly or quite possibly violate existing unauthorized practice laws. These include many lawyers engaged in multijurisdictional law practice and those engaged in multidisciplinary law practice. Also included are house counsel whose principal office is in a state where these house counsel are not legally admitted or otherwise authorized to practice law.

Improving and enforcing unauthorized law practice restrictions is almost entirely a state responsibility; federal involvement is very limited. And, in every state the state's constitution is interpreted as allocating these responsibilities in large measure to the courts of the state. In most states, too, the state's constitution is interpreted as allocating exceptional power to the courts over unauthorized law practice matters—power superior to that of the legislative or executive branches of state government. If the courts and either of the other branches disagree on any aspect of unauthorized practice law, the courts' position prevails in most states. Some state courts have not yet ruled on whether their power over unauthorized practice matters is superior to that of the other branches but may well go with the majority superior power position if forced to decide.

A position contrary to that of the majority has been adopted by the courts in a few states. This minority position is that all three branches have concurrent power over unauthorized law practice matters, but the legislature's position prevails if the courts and the legislature are not in accord. A number of commentators have expressed support for this minority position, in some instances presumably influenced by the tendency of most courts that follow the majority position to construe unauthorized practice laws more favorably to lawyers than nonlawyers and more favorably to in-state lawyers than lawyers from out of state. What also may contribute to some com-

mentators questioning the merits of the majority position is the self-serving nature of the decisions giving the courts superior power. As interpreters of ambiguous state constitutional separation of powers textual provisions, the courts, in effect, are awarding superior power to themselves.

There is some possibility that the majority position on judicial power over unauthorized law practice will be reversed or substantially curtailed by state constitutional amendment, federal intervention, or new state court interpretations of the state's constitution—interpretations that grant the courts only subordinate power over unauthorized law practice. But none of these possibilities is likely in the foreseeable future, which means that the dominant power over unauthorized practice of law in most states will continue to be in the state's courts, meaning that the courts will continue to have final authority over who may and who may not legally provide legal services. Advocates of reform in unauthorized practice laws should, therefore, concentrate their reform efforts on state courts and on convincing these courts to make changes in the law that the reformers favor. The approach can be litigation, with the possibility of favorable caselaw results, or efforts to persuade the courts to adopt court rules that include the desired changes in the law. This latter approach may be preferred by some reform advocates because court rules usually are more comprehensive and inclusive in their coverage than case law.

State courts have very substantial power over unauthorized practice law, but their exercise of that power leaves much to be desired. Improvements are needed in how state courts, especially state supreme courts, go about making decisions on unauthorized practice matters. Greater assurance is needed that the courts' decisions are carefully reasoned and have taken into consideration all relevant information and alternative arguments. There is a particular need for improving the decision-making processes of state courts when these courts are considering adoption of new or revised court rules pertaining to unauthorized law practice. State court rules on unauthorized practice of law can be preferable to case law in this regulatory field by providing a much more comprehensive and detailed set of requirements and exemptions than is likely to emerge from case law. This can greatly relieve the lack of clarity that has plagued this field in most states. However, the court rule adoption processes of state courts have usually lacked the meticulous presentation of data and diverse arguments that litigation provides. These processes need

substantial improvement. But even in deciding litigated cases on unauthorized law practice matters, improvements in the courts' decision-making processes are needed.

Some proposals for improving the decision-making processes of state courts in unauthorized law practice matters appear below. No doubt most of the proposals, if adopted, could result in improved judicial decision making, not just on unauthorized law practice matters but on many other kinds of matters as well. Some of the proposals have already been adopted in some states but merit much wider adoption.

\* More frequent and more open court hearings should be held in most states when new or revised court rules on unauthorized practice are under consideration by the courts. These hearings should be publicized and all interested parties encouraged to attend and to present their views on the rule provisions under consideration. It should also be made clear to all interested parties who it is that has final authority to approve or reject changes in the rules, and unauthorized behind-the-scenes approval or veto power in the governor, chief justice, president of the state bar association, or anyone else should not be permitted.

\* In litigation involving one or more important unauthorized law practice issues, the court before whom the case is pending should take advantage of every available opportunity to obtain all the factual information and legal and policy arguments required to make the best decision the court is capable of making. If the importance of the case merits it, the court should consider such supplemental aids as extensive use of a master to more fully consider some aspects of the case<sup>107</sup> and acceptance of, perhaps even inviting, amicus briefs.<sup>108</sup> If

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107. Following this approach, see, e.g., *In re Opinion No. 26*, 654 A.2d 1344, 1347 (N.J. 1995) (referring case to a special master who held sixteen days of hearings and the master's report was heavily relied on by the court in its decision).

108. Amicus briefs are relatively common in unauthorized practice cases, in some cases because trade and professional associations often consider such cases relevant to their members' interests. See, e.g., *Reed v. Labor & Indus. Relations Comm'n*, 789 S.W.2d 19, 20 (Mo. 1990) (Associated Industries of Missouri was amicus curiae); *In re Opinion No. 26*, 654 A.2d 1344, 1345 (N.J. 1995) (a builders league, the state bar association and four county bar associations were amici curiae); *Linder v. Ins. Claims Consultants*, 560 S.E.2d 612, 615 (S.C. 2002) (South Carolina Bar and National Association of Public Insurance Adjusters were amici curiae.).

greater clarity seems needed in a wider segment of unauthorized practice law than what deciding the issues before the court requires, the court should consider adding to its opinion statements that are merely dictum—statements of lesser authority but that provide supplemental clarification.<sup>109</sup>

\* In deciding unauthorized practice of law issues, state court opinions, including most particularly those of state supreme courts, should be more carefully and thoroughly reasoned. Far too often, the reasoning in these opinions has been superficial. This is very evident in opinions of courts following the majority position that the courts' constitutional power over unauthorized practice of law is superior to that of the other branches of government. Given the gross ambiguity of most state constitutional texts on judicial power, the typical reliance of these courts on their inherent power as the basic rationale for their superior constitutional power over unauthorized practice of law is inadequate. In essence, the reasoning of these courts amounts to no more than "we have the superior power because we have the superior power." The scope of the courts' power over unauthorized practice is an important issue and merits a better justification for its resolution. Those state courts that have ducked the issue of whether or not their constitutional power over unauthorized practice of law issues is superior to that of the other two branches of government also have failed to fulfill their decision-making responsibilities adequately.

\* State supreme courts should limit more extensively the number of litigated cases that they are willing to hear each year. They need not go as far as the United States Supreme Court has gone in limiting case intake, but more limited case intakes are needed. The prospects for state supreme courts improving their performance in deciding important issues, such as those concerning unauthorized law practice, would be substantially increased if they had more time to consider those issues. Almost all state supreme courts take and hear too many cases, and relief from these overloads is needed. In some states this

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109. Certainty in the law generally, including certainty in rules set forth by courts in their judicial opinions, has been a declared high priority of some judges, thereby enhancing predictability, a major objective of law. See, e.g., Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743 (1994) (discussing Chief Justice Edwin J. Peterson's stress on certainty in his judicial opinions) (the Loving article is part of a symposium tribute to Chief Justice Peterson at the time of his retirement from the Oregon Supreme Court).

will require eliminating mandatory supreme court review requirements. This could necessitate appointing additional intermediate appellate court judges or, in states without intermediate appellate courts, adding such courts.<sup>110</sup>

\* More and better state court support staff are needed to relieve the administrative burden on sitting judges and to act as research aids to the judges in reaching decisions in litigated cases, preparing opinions in those cases and considering new or revised court rules. Additional support staff would be helpful in enabling state court judges to improve their decision making on unauthorized practice matters and most other matters as well. State court judges increasingly are being burdened with administrative duties as case volumes increase. More and better support staff is needed to help relieve this burden and to give the judges more time for hearing and deciding the cases before them. Also, state courts, state supreme courts particularly, need more and better support staff to help provide the background research needed to enable the courts to produce more carefully and thoroughly reasoned opinions and more suitable court rules. One means of doing this would be to have a small group of research experts available to the state's judiciary that, on request, would provide data and source materials that a court believed were needed in deciding a case or preparing a court rule. Many state legislators have research staff experts available to assist them in their deliberations, and so should state courts. Another approach to making more qualified research staff available to state supreme courts would be to revise the typical state supreme court clerkship system. Instead of many state supreme court clerks being recent high-ranking law school graduates hired for only one year, clerks would be hired who have more experience and more research expertise, and they would be permanent employees. To attract and retain those with the requisite qualifications, this approach would require substantially higher salaries for the clerks, as the present recent law school graduate positions are low-salaried.<sup>111</sup> The

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110. Some states with smaller populations, including Montana and South Dakota, have no intermediate appellate courts for more important cases.

111. Many New York state courts now have experienced full-time lawyer clerks hired for indefinite terms at respectable salaries, and there seems to be general satisfaction with this type of clerkship personnel. On appointment and qualification of court law clerks in New York, see N.Y. R. CT., R. C.J. § 5.1.

traditional state supreme court clerkship system could also be revised to make available to the judges a wider range of research help. This could be done by hiring a group of permanent supreme court clerks who are diverse as to knowledge and expertise, pooling the clerks rather than assigning each clerk to a particular judge, and permitting any of the supreme court judges to call on the pool for research help as needed.

\* State courts should maintain more cooperative and more accommodating relations with the other branches of government on important matters, such as unauthorized law practice, that are subject to legal control. This can in some instances prove helpful in avoiding disruptive and contentious interbranch controversies. More significantly, it can expand each branch's understanding of the problems within its jurisdiction and result in better solutions to those problems. For example, state courts may obtain a better perception of how unauthorized law practice problems can best be resolved from action on these problems taken by the state's legislature. This should probably be the determinative reason for the courts, in interpreting the state's constitution, to reject the interpretation that they have the sole and exclusive power over unauthorized law practice matters, rather than concurrent but ultimate power.

\* In taking action on unauthorized practice problems, state courts should place less reliance on views of the organized bar, including those of their state bar association and those of the ABA. This is not to say that courts should ignore the recommendations and reactions of the organized bar on unauthorized practice issues. Organized bar responses to these issues are often the result of careful analysis of the problems and frequently reflect not just the interests of lawyers but broader public interests as well. But the courts should make a greater effort to ascertain the views of other interest groups, consumers included, when considering unauthorized practice problems. This can be done in a variety of ways—for example, by well-publicized court hearings as proposed above, by invitation to submit recommendations when new court rules relevant to unauthorized practice are under consideration and by careful research on published interest-group positions on unauthorized practice is-

sues.<sup>112</sup> Judges are lawyers, and when they appear to be unduly beholden to the organized bar, their independence and objectivity are subject to serious question.

Important determinants of the quality, availability and cost of legal services in every state are the state's unauthorized practice laws and how vigorously those laws are enforced. The courts in each state are largely responsible for not only deciding the legal scope of unauthorized law practice restrictions, but also how power over unauthorized law practice issues are constitutionally allocated among the different branches of state government. In addition, state courts have a significant role in enforcing the laws pertaining to unauthorized law practice. However, as law makers on unauthorized law practice matters, both in their opinions in litigated cases and in their court rules, state courts should do better than they have been doing. The processes they follow in making their decisions could be improved; and if needed improvements were made, better and more trustworthy decisions on unauthorized law practice matters would follow. Hopefully the courts will make these improvements before there is a surge of pressure on them by influential pressure groups to reform the laws concerning unauthorized law practice. Sooner or later, such pressures seem certain to develop and to include not only demands that many existing unauthorized law practice restrictions be changed, but also that the courts reconsider their constitutional interpretations of how much power they have over unauthorized law practice matters. State supreme courts in particular should improve their operations and revise their priorities so that, when taking action on such important matters as unauthorized law practice, they are functioning up to their full potential.

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112. The South Carolina Supreme Court has even taken the unique approach of inviting declaratory judgment proceedings on unauthorized practice of law questions. At the conclusion of its opinion in *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123 (S.C. 1992), in which the court rejected proposed rules submitted by the state bar association, the court added:

We urge any interested individual who becomes aware of such conduct [conduct that may be the unauthorized practice of law] to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct. We hope by this provision to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law.

*Id.* at 125.